

2579
No. 12230

United States
Court of Appeals
for the Ninth Circuit

DON DOROTHY and PACIFIC NORTHERN
AIRLINES, INC., a Corporation,

Appellant,

VS.

C. A. McCANDLESS,

Appellee.

Transcript of Record

Appeal from the District Court for the Territory of Alaska,
Third Division

FILED

JUN 13 1949

PAUL P. O'BRIEN,

CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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JOHN E. MANDERS,
Anchorage, Alaska,

EDWARD V. DAVIS,
Anchorage, Alaska,

Attorneys for Don Dorothy and Pacific
Northern Airlines, Inc., a Corporation,
Defendants, respectively. [1*]

* Page numbering appearing at foot of page of original
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In the District Court for the Territory of Alaska,
Third Division

No. A-4725

C. A. McCANDLESS,

Plaintiff,

vs.

DON DOROTHY and PACIFIC NORTHERN
AIRLINES, INC., a Corporation,
Defendants.

COMPLAINT

Comes now the plaintiff in the above-entitled action, and for cause of action against the above-named defendants, alleges:

I.

That the plaintiff was at all times mentioned herein the owner of a Stinson Aircraft, designated as NC18411, said Aircraft being of a Stinson SR-9 type, equipped with a 450 horsepower Pratt and Whitney engine.

II.

That at all times herein mentioned Don Dorothy, co-defendant above-named, was an employee and agent of the Pacific Northern Airlines, Inc., a corporation.

III.

That the defendant, Pacific Northern Airlines, Inc., is a corporation.

IV.

That on or about the 4th day of September, 1947, the defendant, Don Dorothy, representing to the

plaintiff that the said Don Dorothy was the representative of and acting on behalf of the co-defendant, Pacific Northern Airlines, Inc., did negotiate with the plaintiff for the purchase of said Aircraft; that thereupon the plaintiff and the defendant, who then and there represented that he was acting for the co-defendant, Pacific Northern Airlines, Inc., entered into a verbal agreement, by which the plaintiff, at the instance and request, agreed with the said Don Dorothy that [2] said Aircraft could be taken by the said Don Dorothy to the hangar owned by the said Pacific Northern Airlines and located at Merrill Field, Anchorage, Alaska, for the purpose of having said Aircraft examined and inspected by employees of the defendant corporation.

V.

That thereafter the said Don Dorothy, acting for and on behalf of said defendant corporation, wrongfully and unlawfully took possession of said Aircraft and converted the same to the use and benefit of the defendant corporation; that the said defendant, Don Dorothy, in violation of the verbal agreement *agreement* between the plaintiff and the defendants, wrongfully and unlawfully flew said Aircraft on the 6th day of September, 1947, from Anchorage, Alaska, to Kasilof and Kenai, Alaska; that while the defendant, Don Dorothy, had said Aircraft at said towns the said Don Dorothy did at times unknown to the plaintiff convert said Aircraft to the use and benefit of the defendant corporation by engaging in the hauling of mail, freight, and passengers between said towns.

VI.

That while the defendant, Don Dorothy, was engaged in the use and operation of said Aircraft as aforesaid, said Aircraft was landed by the said Don Dorothy upon a beach of Cook Inlet near the town of Kenai; that said Aircraft was then wrecked by the said Don Dorothy; that said Aircraft as a result of said wreck was totally destroyed.

VII.

That on the 6th day of September, 1947, the date on which the said Don Dorothy unlawfully and wrongfully took possession thereof and converted the same to the use of the defendant corporation, the reasonable value of said plane was in the sum of \$8,500.00. [3]

VIII.

That the plaintiff has made demands upon the defendants for the sum of \$8,500.00; that the defendants have neglected, failed and refused to pay to the plaintiff said sum or any portion thereof and the whole thereof is now due and owing from the defendants to the plaintiff; wherefore the plaintiff prays judgment against the defendants, as follows:

1. That the Court award to the plaintiff the sum of \$8,500.00 as reimbursement to the plaintiff for the reasonable value of said plane and in compensation for the loss suffered by the plaintiff because of the wrongful and unlawful conversion of said Aircraft by the defendants to the use of said defendants.

2. That the plaintiff be awarded attorneys' fees of \$1,500.00.

3. That the plaintiff recover of the defendants the plaintiff's costs and disbursements herein occurred and expended.

/s/ C. A. McCANDLESS,
Plaintiff.

United States of America,
Territory of Alaska—ss.

C. A. McCandless, being first duly sworn on oath deposes and says: That he is the plaintiff in the above-entitled action; that he has read the foregoing complaint, knows the contents thereof, and that the same is true he verily believes.

/s/ C. A. McCANDLESS.

Subscribed and Sworn to before me this 1st day of October, 1947.

(Seal) /s/ EDWARD L. ARNELL,
Notary Public in and for Alaska.

My commission expires 6-21-51.

[Endorsed]: Filed Oct. 6, 1947. [4]

[Title of District Court and Cause.]

DEMURRER

Comes now Don Dorothy, one of the above-named defendants, and for himself but not for his co-defendant, demurs to plaintiff's Complaint filed in this action for the reason that such Complaint does not

state facts sufficient to constitute a cause of action.

Dated at Anchorage, Alaska, this 6th day of November, 1947.

/s/ EDWARD V. DAVIS,

Attorney for the Defendant, Don Dorothy.

Received: /s/ D. H. Cuddy, 7 Nov., 1947.

[Endorsed]: Filed Nov. 7, 1947. [5]

[Title of District Court and Cause.]

DEMURRER OF DEFENDANT PACIFIC
NORTHERN AIRLINES, INC.

Comes now Pacific Northern Airlines, Inc., one of the defendants in the above-entitled action, and demurs to the complaint of plaintiff on file herein and for grounds of demurrer alleges:

I.

That said complaint does not state facts sufficient to constitute a cause of action.

II.

That said complaint does not state facts sufficient to constitute a cause of action against Pacific Northern Airlines, Inc., a corporation.

Wherefore, defendant prays that plaintiff take nothing by his [6] complaint and defendant be hence dismissed together with its costs of suit incurred herein.

/s/ JOHN E. MANDERS,

Attorney for Defendant, Pacific Northern Airlines,
Inc.

(Acknowledgment of Service.)

[Endorsed]: Filed Nov. 6, 1947. [7]

M.O. OVERRULING DEMURRER

Now at this time the plaintiff not being present in court but represented by Edward L. Arnell, of his counsel, the defendants not being present, but represented by John E. Manders and Edward V. Davis, of their counsel. Whereupon the following proceedings were had, to-wit:

Argument to the Court was had by John E. Manders, for and in behalf of the defendants.

Argument to the Court was had by Edward L. Arnell for and in behalf of the plaintiff.

Argument to the Court was had by John E. Manders, for and in behalf of the defendants.

Whereupon the Court having heard the arguments of respective counsel and being fully and duly advised in the premises, overruled demurrer in cause No. A-4725, entitled C. A. McCandless, plaintiff, versus Don Dorothy and Pacific Northern Airlines, Inc., defendants, and defendants given 10 days within which to answer.

Entered Court Journal No. G-15, Page No. 278, Nov. 21, 1947. [8]

[Title of District Court and Cause.]

ANSWER

Comes now Don Dorothy one of the above-named defendants, and for himself and not for his co-defendant, by way of answer to plaintiff's Complaint, admits, denies and alleges as follows:

I.

Admits the allegations of the first, second and third paragraphs of plaintiff's Complaint.

II.

Defendant, Don Dorothy admits the allegations of the fourth paragraph of the plaintiff's Complaint insofar as they go, but alleges that the defendant, Don Dorothy for and on behalf of the defendant, Pacific Northern Airlines, at the same time, had an additional agreement with the plaintiff, C. A. McCandless concerning the rental of the above-described aircraft by the defendant corporation all as will more fully appear from the defendant's affirmative defense hereinafter set out.

III.

Defendant denies each and all of the allegations of the fifth paragraph of the plaintiff's Complaint, save and except that defendant admits that as an agent of defendant corporation, defendant, Don Dorothy, flew the aircraft described in plaintiff's Complaint to Kenai, Alaska, and did haul certain freight and passengers for the defendant corporation with such aircraft, and in that connection, defendant, Don Dorothy alleges that he took possession of such aircraft under a rental or charter agreement entered into between defendant, Don Dorothy, acting for and in behalf of Pacific Northern Airlines, and plaintiff, C. A. McCandless.

IV.

Defendant denies each and all the allegations of the sixth paragraph of plaintiff's Complaint, save and except the allegation that the defendant, Don Dorothy landed the aircraft therein mentioned upon the beach of Cook Inlet, the defendant, Don Dorothy, alleges that the aircraft was landed safely on the

beach at Kenai, Alaska, but that due to a mechanical failure of the brakes of the aircraft, the exact cause of which is unknown to the defendant, Don Dorothy, the aircraft swerved from the beach into the mud at the edge of Cook Inlet, and that the aircraft was thereupon damaged by the incoming tide. [9]

V.

Defendant denies each and all the allegations of the seventh paragraph of plaintiff's Complaint and alleges that the aircraft at the time the defendant took possession of the same, was of a value not exceeding six thousand dollars.

VI.

Defendant admits that he has refused to pay the plaintiff the sum of eight thousand five hundred dollars (\$8,500.00) and denies each and all the other allegations of the eighth paragraph of plaintiff's complaint.

VII.

As a further answer to plaintiff's Complaint and by way of affirmative defense thereto, Defendant, Don Dorothy alleges as follows:

1. That on or about the fourth day of September, 1947, the defendant, Don Dorothy, for and on behalf of the defendant, Pacific Northern Airlines, arranged a charter agreement with the plaintiff concerning the aircraft described in the first paragraph of plaintiff's Complaint. That by the terms of such agreement the defendant airline was to be entitled to use the said aircraft at such times as might be required by the defendant airline in hauling passengers, freight and mail between Anchorage, Alaska, and Homer,

Alaska, and intermediate points at a charter rate of thirty-five dollars (\$35.00) per hour. That at the same time defendant Dorothy had some discussion with the plaintiff about possible purchase of the aircraft to the defendant airline for the sum of eight thousand five hundred dollars (\$8,500.00). That the offer was not accepted and the sale was not consummated and that it was agreed that if the defendant airline was interested in purchasing the aircraft it should be entitled to have the aircraft inspected by its own mechanics and thereupon further negotiations would be had concerning the possible sale of the aircraft.

2. That on or about the sixth day of September, 1947, the defendant, Dorothy, for and on behalf of Pacific Northern Airlines, took possession of the aircraft described in plaintiff's Complaint, under the rental or charter agreement above mentioned and flew the aircraft to Kenai, Alaska, and landed the aircraft on the beach at such place.

3. That during the landing roll of the aircraft the right wheel of the aircraft became locked, causing the aircraft to veer sharply to the right and into the mud below the beach and that thereafter before the aircraft could be removed from the mud, the incoming tide, partially covered the aircraft and caused certain damage to the aircraft.

4. That the beach at the place selected by defendant, Dorothy, for the landing was hard and was in a safe condition for making a landing and that in fact the landing was made safely and no damage would have resulted except for the mechanical failure of the brake as above-described. That the brake

locked from some mechanical failure of the aircraft, the cause of which is unknown to defendant, and that the defendant, Don Dorothy, was not negligent in any manner in making the landing at the time and in the place in question and that the defendant, Don Dorothy, is not responsible in any way for the fact that the airplane left its course and became mired in the mud. That the defendant, Don Dorothy, used all reasonable precautions in flying and in landing the aircraft and that the damage done to the aircraft by the incoming tide was caused by [10] forces beyond the control of the defendant, Don Dorothy, and without any negligence or carelessness on his part.

5. That thereupon as soon as the same could be done, the aircraft was removed from the mud and was returned to Anchorage, Alaska, and to the possession of the plaintiff.

6. That defendant, Don Dorothy, is not responsible in any manner for the damage which occurred to the plaintiff's aircraft.

Wherefore, defendant, Don Dorothy, prays that the plaintiff may take nothing of the defendant, Dorothy, by reason of plaintiff's Complaint, and that the defendant, Dorothy, may have of and from the plaintiff, defendant's costs in this action incurred, including a reasonable attorney's fee to be set by the Court.

/s/ EDWARD V. DAVIS,

Attorney for the Defendant, Don Dorothy.

(Duly Verified.)

[Endorsed]: Filed Dec. 1, 1947. [11]

[Title of District Court and Cause.]

ANSWER

Comes now Pacific Northern Airlines, Inc., one of the defendants above-named, and for itself and not for its co-defendant, in answer to plaintiff's complaint, admits, denies and alleges as follows:

I.

Admits the allegations in Paragraphs I, II and III of plaintiff's complaint.

II.

Defendant Pacific Northern Airlines, Inc., admits the allegations of the fourth paragraph of the plaintiff's complaint insofar as they go, but alleges that the defendant, Don Dorothy, for and on behalf of the defendant Pacific Northern Airlines, Inc., at the same time had an additional agreement with the plaintiff, C. A. MacCandless concerning the rental of the above-described aircraft by the defendant corporation all as will more fully appear from this defendant's affirmative defense hereinafter set out.

III.

Defendant denies each and all of the allegations of the fifth paragraph of the plaintiff's complaint, save and except that defendant admits that as an agent of defendant corporation, defendant Don Dorothy flew the aircraft described in plaintiff's complaint to [12] Kenai, Alaska, and did haul certain freight and passengers for the defendant corporation with such aircraft, and in that connection defendant alleges that possession of such aircraft was taken under a rental or charter agreement entered into between

defendant, Don Dorothy, acting for and in behalf of Pacific Northern Airlines, Inc., and plaintiff C. A. McCandless.

IV.

Defendant denies each and all the allegations of the sixth paragraph of plaintiff's complaint, save and except the allegation that the defendant Don Dorothy landed the aircraft therein mentioned upon the beach of Cook Inlet, and defendant Pacific Northern Airlines, Inc., alleges that said aircraft was landed safely on the beach at Kenai, Alaska, but that due to a mechanical failure of the brakes of the aircraft, the exact cause of which is unknown to this defendant, the aircraft swerved from the beach into the mud at the edge of Cook Inlet, and that the aircraft was thereupon damaged by the incoming tide.

V.

Defendant denies each and all the allegations of the seventh paragraph of plaintiff's complaint and alleges that the aircraft at the time the defendant took possession of the same, was of a value not exceeding thirty-five hundred dollars (\$3,500.00).

VI.

Defendant admits that it has refused to pay the plaintiff the sum of eight thousand five hundred dollars (\$8,500.00), and denies each and all the other allegations of the eighth paragraph of plaintiff's complaint.

VII.

As a further answer to plaintiff's complaint, and

by way of affirmative defense thereto, this defendant alleges as follows:

1. That on or about the fourth day of September, 1947, the defendant, Don Dorothy, for and on behalf of the defendant Pacific Northern Airlines, Inc., arranged a charter agreement with [13] the plaintiff concerning the aircraft described in the first paragraph of plaintiff's complaint. That by the terms of such agreement the defendant airline was to be entitled to the possession and the use of said aircraft at such times as might be required by the defendant airline in hauling passengers, freight and mail between Anchorage, Alaska, and Homer, Alaska, and intermediate points, at a charter rate of thirty-five dollars (\$35.00) per hour. That at the same time defendant Dorothy had some discussion with the plaintiff about a possible purchase of the aircraft by this defendant for the sum of eight thousand five hundred dollars (\$8,500.00). That the offer was not accepted and the sale was not consummated, and that it was agreed that if this defendant was interested in purchasing the aircraft it should be entitled to have the aircraft inspected by its own mechanics and thereupon further negotiations would be had concerning the possible sale of the aircraft.

2. That on or about the sixth day of September, 1947, the defendant, Don Dorothy, for and on behalf of Pacific Northern Airlines, Inc., took possession of the aircraft described in plaintiff's complaint under the rental or charter agreement above-mentioned and flew the aircraft to Kenai, Alaska, and landed the aircraft on the beach at such place.

3. That during the landing roll of the aircraft the right wheel of the aircraft became locked, causing the aircraft to veer sharply to the right and into the mud below the beach and that thereafter before the aircraft could be removed from the mud, the incoming tide partially covered the aircraft and caused certain damage to the aircraft.

4. That the beach at the place selected by defendant, Don Dorothy, for the landing was hard and was in a safe condition for making a landing, and that in fact the landing was made safely and no damage would have resulted except for the mechanical failure of the aircraft, the cause of which is unknown to defendant, and that this defendant and defendant Don Dorothy were not negligent in any [14] manner in making the landing at the time and in the place in question, and that this defendant and defendant Don Dorothy are not responsible in any way for the fact that the airplane left its course and became mired in the mud. That all reasonable precautions were used in flying and in landing the aircraft, and that the damage done to the aircraft by the incoming tide was caused by forces beyond the control of this defendant and defendant Don Dorothy, and without any negligence or carelessness on its or his part.

5. That thereupon, as soon as the same could be done, the aircraft was removed from the mud and was returned to Anchorage, Alaska, and to the possession of the plaintiff.

6. That this defendant is not responsible in any manner for the damage which occurred to the plaintiff's aircraft.

Whereupon, this defendant prays that plaintiff take nothing by his action, and that this defendant be hence dismissed with its costs of suit herein incurred.

JOHN E. MANDERS,

Attorney for Defendant, Pacific Northern Airlines,
Inc. [15]

(Duly Verified.)

(Acknowledgment of Service.)

[Endorsed]: Filed Dec. 2, 1947. [16]

[Title of District Court and Cause.]

REPLY

Comes now, C. A. McCandless, plaintiff, and replies to the affirmative defense stated in Paragraph VII of the Answer heretofore filed by Don Dorothy, one of the above-named defendants, and alleges as follows:

1. Plaintiff denies each and every allegation contained in the first ten (10) lines of Subparagraph (1) of Paragraph VII of said Answer, relative to the existence of a charter agreement; plaintiff admits the allegations contained in the remainder of the said Subparagraph (1).

2. Plaintiff admits the taking of the aircraft by the said defendant on or about the 6th day of September, 1947; plaintiff denies the existence of a rental or charter agreement, as alleged in Subparagraph (2) of Paragraph VII of the said Answer.

3. Plaintiff denies the allegations of Subparagraphs (3), (4), (5), and (6), of Paragraph VII, of said Answer.

Wherefore, plaintiff prays that he may have judgment against the defendant as asked in the complaint.

/s/ WENDELL P. KAY,
Attorney of Plaintiff.

(Duly Verified.)

[Endorsed]: Filed Jan. 26, 1948. [17]

[Title of District Court and Cause.]

REPLY

Comes now, C. A. McCandless, plaintiff and in reply to the affirmative defense stated in Paragraph VII of the Answer filed herein by Pacific Northern Airlines, Inc., one of the defendants above-named, alleges as follows:

1. Plaintiff denies the allegations contained in Subparagraph (1) of Paragraph VII of said Answer, except that plaintiff admits that some discussion was had with the defendant, Don Dorothy, concerning the purchase of the aircraft for the sum of \$8,500.00, which sale was not consummated.

2. Plaintiff admits that Don Dorothy took possession of the aircraft on or about the 6th day of September, 1947, but denies that such taking was under any rental or charter agreement as alleged in Subparagraph (2) of Paragraph VII of said Answer.

3. Plaintiff denies the allegations of Subparagraphs (3), (4), (5), and (6), of Paragraph VII of said Answer.

Wherefore, plaintiff prays for judgment against the defendant as asked in the Complaint.

/s/ WENDELL P. KAY,
Attorney for Plaintiff.

(Duly Verified.)

[Endorsed]: Filed Jan. 26, 1948. [18]

TRIAL BY JURY CONTINUED

Now came the Trial Jury who, on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of cause No. A-4725, entitled C. A. McCandless, plaintiff, versus Don Dorothy and Pacific Northern Airlines, Inc., a corporation, defendants, was resumed.

William V. Smith, being first duly sworn, testified for and in behalf of the defendants.

The defendant rests.

At this time the Trial Jury was excused upon motion of John E. Manders, of counsel for defendants, pending arguments on point of law.

At this time John E. Manders of counsel for defendants, renews motions for non-suit and directed verdict on same grounds as heretofore; Edward V. Davis, of counsel for defendants, concurring therein; motions denied.

At this time Wendell P. Kay, of counsel for

plaintiff, moves the Court for leave to amend pleadings to conform to proof in respect to word "Kasilof" in Paragraph 6, and the Clerk was instructed to strike the word "Kasilof" and substitute word "Kenai," counsel for defendants not objecting thereto.

Trial Jury recalled.

At this time the Court read his instructions to the Trial Jury.

At 3:32 o'clock p.m. Court duly admonished the Trial Jury and continued cause to 3:52 o'clock p.m.

Entered Court Journal No. G 16, Page No. 116.
Feb. 25, 1948. [19]

TRIAL BY JURY CONTINUED

Now came the Trial Jury who, on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of cause No. A-48725, entitled C. A. McCandless, plaintiff, versus Don Dorothy and Pacific Northern Airlines, Inc., a corporation, defendants, was resumed.

At this time John E. Manders, of counsel for defendants, moves the Court that the Jury be excused pending arguments on points of law; Jury excused.

At this time John E. Manders, of counsel for defendants, moves the Court for non-suit on grounds that plaintiff has failed to prove his case as laid; and for a directed verdict on grounds that plaintiff has failed to sustain the allegations of his com-

plaint as to relief demanded and has failed to show conversion of property as claimed in Complaint.

Edward V. Davis, of counsel for defendants, concurs in motions in behalf of defendant Don Dorothy.

Motion denied, and the Trial Jury recalled.

Don Dorothy, being first duly sworn, testified for and in his own behalf.

At 10:35 o'clock a.m. Court duly admonished the Trial Jury and continued cause to 10:45 o'clock a.m.

Entered Court Journal No. G 16, Page No. 113, Feb. 25, 1948. [20]

HEARING ON ORAL MOTION RE JUDGMENT NOTWITHSTANDING VERDICT

Now at this time hearing on oral motion re judgment notwithstanding verdict in cause No. A-4725, entitled C. A. McCandless, plaintiff, versus Don Dorothy and Pacific Northern Airlines, Inc., a corporation, defendants, came on regularly before the Court, the plaintiff not being present but represented by Wendell P. Kay, of his counsel, the defendant, not being present but represented by John E. Manders. The following proceedings were had, to wit:

Argument to the Court was had by John E. Manders, for and in behalf of both defendants, Don Dorothy and Pacific Northern Airlines, Inc., a corporation.

No argument by plaintiff.

Whereupon the Court having heard the argu-

ment of respective counsel and being fully and duly advised in the premises, overruled motion.

Entered Court Journal No. G 16, Page No. 132,
Mar. 2, 1948. [21]

In the District Court for the Territory of Alaska,
Third Division

No. A-4725

C. A. McCANDLESS,

Plaintiff,

vs.

DON DOROTHY and PACIFIC NORTHERN
AIRLINES, INC., a Corporation,

Defendants.

JUDGMENT

This Matter having come on for trial on the 24th day of February, 1948, the parties appearing by their attorneys W. N. Cuddy and Wendell P. Kay, counsel for Plaintiff, and Edward V. Davis, counsel for defendant, Don Dorothy, and John E. Manders, counsel for the defendant Pacific Northern Airlines, Inc., a Corporation, and the Jury of twelve (12) persons having been regularly impaneled and sworn according to law to try said action, and witnesses for and on behalf of the plaintiff and defendants having been sworn and examined, and the jury having heard the evidence, arguments of counsel and instructions of the Court, having retired to consider their verdict, and the Jury having subsequently returned with a sealed verdict into Court

at 10 o'clock a.m., on the 26th day of February, 1948, and W. F. Cooper, Foreman of said Jury, having delivered to the Court said verdict, and the roll of the Jury then having been called, and ten (10) members thereof being present, Walter F. Brown and Mrs. Mike O'Neill, having been excused because of illness and upon stipulation of counsel, the Court thereupon having ordered said sealed verdict opened and read in the presence of the Jurors, said Verdict so read being as follows:

“Verdict No. 1. We, the Jury, duly selected, impaneled and sworn to try the above-entitled cause, do find for the plaintiff and against the defendants, and do find that the plaintiff is entitled to recover of and from the said defendants, and each of them the sum of \$7,500.00.

Dated at Anchorage, Alaska, this 25th day of February, 1948.

/s/ W. F. COOPER,
Foreman.” [22]

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is

Ordered, Adjudged and Decreed that the plaintiff have and recover from the Defendant, Don Dorothy, and Pacific Northern Airlines, a Corporation, and each of them, the sum of \$7,500.00, together with interest thereon at the rate of six per cent (6%) per annum from the date hereof until paid, and it is

Further Ordered, Adjudged and Decreed that the plaintiff have and recover from said Defend-

ants the sum of \$800.00 for plaintiff's costs and disbursements incurred in this action, and it is

Ordered, Adjudged and Decreed that the plaintiff have and recover from the said defendants the sum of \$800.00 as and for his attorney's fees incurred in this action.

Made and Entered this 26th day of March, 1948.

/s/ ANTHONY J. DIMOND,
District Court Judge.

Entered Court Journal G 16, Page No. 222, Mar. 26, 1948.

(Acknowledgment of Service.)

[Endorsed]: Filed March 26, 1948. [23]

[Title of District Court and Cause.]

MOTION FOR A NEW TRIAL

Come now the defendants above named and move this honorable court for an order setting aside and vacating the verdict and judgment of the jury heretofore rendered and entered in favor of the plaintiff and against the defendants in the above-entitled action, and feeling aggrieved by such verdict and judgment move that a new trial of said action be granted to said defendants for the following causes alleged by defendants as materially effecting their substantial rights and the rulings of the court which were prejudicial to their substantial rights, to wit:

Errors in law occurring at the trial and excepted to by the defendants:

1. The court erred in overruling the respective

demurrers of defendants to the complaint of plaintiff on file herein.

2. The court erred in denying defendants' motion at the close of plaintiff's case to grant a non-suit on the ground that plaintiff had failed to prove a case as laid in his complaint.

3. The court erred in denying defendants' motion at the close of plaintiff's case to grant a directed verdict on the ground that plaintiff had failed to sustain the allegations of his complaint or of the relief demanded, and that plaintiff had failed to show any conversion of the property, the subject matter of his complaint. [24]

4. The court erred in again denying defendant's motion for a non-suit at the close of the case on the ground that plaintiff had failed to prove a case as laid in his complaint.

5. The court erred in again denying defendants' motion for a directed verdict at the close of the case on the ground that plaintiff had failed to sustain the allegations of his complaint or of the relief demanded therein, and that plaintiff had not shown any conversion of the property, the subject matter of said complaint.

6. The court erred in denying defendants' motion for a judgment notwithstanding the verdict on the ground that plaintiff had failed to prove a case as laid in his complaint and further that plaintiff had failed to sustain the allegations of the complaint or of the relief demanded therein and that plaintiff had not shown any conversion of the property, the subject matter of plaintiff's complaint.

Wherefore, defendants move said court to grant a new trial in the above-entitled action.

Dated this 3rd day of March, 1948.

/s/ EDWARD V. DAVIS,

Attorneys for Defendant,

Don Dorothy.

/s/ JOHN E MANDERS,

Attorney for Defendant, Pacific Northern Airlines,
Inc.

(Acknowledgment of Service.)

[Endorsed]: Filed March 3, 1948. [25]

HEARING ON MOTION FOR NEW TRIAL

Now at this hearing on motion for new trial in cause No. A-4725, entitled C. A. McCandless, plaintiff, versus Don Dorothy and Pacific Northern Airlines, Inc., a corporation, defendants, came on regularly before the Court, the plaintiff not being present but represented by Wendell P. Kay, of his counsel, the defendants not being present but represented by John E. Manders, of their counsel. The following proceedings were had, to-wit:

Argument to the Court was had by John E. Manders, for and in behalf of the defendants.

Whereupon the Court having heard the argument of respective counsel and being fully and duly advised in the premises, denied motion for new trial.

Entered Court Journal No. G 16, Page 200, Mar. 19, 1948. [26]

[Title of District Court and Cause.]

PETITION FOR APPEAL

The above-named defendants, conceiving themselves aggrieved by the judgment made and entered on the 26th day of March, 1948, in the above-entitled cause, do hereby appeal from the said judgment to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignments of error, which is filed herewith, and said defendants pray that this appeal may be allowed, that a citation may issue according to law, and that a transcript of the record, proceedings and documents upon which said judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Petitioners further pray that a supersedeas may be granted pending the final disposition of this cause, and that the amount of surety may be fixed by the order allowing the appeal.

Dated at Anchorage, Alaska, April 26th, 1948.

/s/ JOHN E. MANDERS,

/s/ EDWARD V. DAVIS,

Attorneys for Defendants, Pacific Northern Airlines, Inc., and Don Dorothy, Respectively.

[Endorsed]: Filed April 26, 1948. [27]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL AND FOR
SUPERSEDEAS

The petition of Don Dorothy and Pacific Northern Airlines, Inc., defendants in the above-entitled action, for an appeal from the final judgment rendered therein, is hereby granted and the appeal is allowed, and upon petitioners filing a bond in the sum of Ten Thousand Dollars (\$10,000.00) with sufficient sureties and conditioned as required by law, the same shall operate as a supersedeas of the judgment made and entered in the above cause and shall suspend and stay all further proceeding in this court until the termination of said appeal by the United States Circuit Court of Appeals for the Ninth Circuit.

/s/ ANTHONY J. DIMOND,

District Judge.

Dated April 26th, 1948.

[Endorsed]: Filed April 26, 1948. [28]

[Title of District Court and Cause.]

CITATION ON APPEAL

To the plaintiff, C. A. McCandless, and his attorneys,
W. N. Cuddy and Wendell P. Kay:

You and each of you are hereby cited and admonished to appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held at San Francisco, in the State of California, forty

(40) days from the date of this citation, pursuant to the order allowing appeal on file in the office of the Clerk of the District Court for the Territory of Alaska, Third Division, in that certain action pending in said District Court, entitled, "C. A. McCandless, plaintiff, vs. Don Dorothy and Pacific Northern Airlines, Inc., a corporation, defendants," being No. A-4725 in the files of said District Court, and wherein Don Dorothy and Pacific Northern Airlines, Inc., are appellants and C. A. McCandless is appellee, to show cause, if any there be, why the judgment rendered against Don Dorothy and Pacific Northern Airlines, Inc., should not be corrected and why speedy justice should not be done to the parties in the premises and in that behalf.

Witness the Honorable Anthony J. Dimond, District Judge for the Territory of Alaska, Third Division, this 26th day of April, 1948, and of the Independence of the United States the 172nd.

/s/ ANTHONY J. DIMOND,
District Judge.

[Endorsed]: Filed April 26, 1948. [29]

[Title of District Court and Cause.]

ASSIGNMENTS OF ERROR

Now come the defendants and appellant herein and file the following assignments of error upon which they will rely in the prosecution of their appeal to the United States Circuit Court of Ap-

peals for the Ninth Circuit, from the final judgment and entered in this cause on the 26th day of March, 1948, by the above-entitled court, as follows, to-wit:

I.

That the court erred in overruling the respective demurrers of defendants to the complaint of plaintiff on file herein, to which ruling defendants excepted and the exception was allowed.

II.

That the court erred in denying defendants' motion at the close of plaintiff's case to grant a non-suit on the ground that plaintiff had failed to prove a case as laid in his complaint, to which ruling defendants excepted and the exception was allowed.

III.

That the court erred in denying defendants' motion at the close of plaintiff's case to grant a directed verdict on the ground that plaintiff had failed to sustain the allegation of his complaint or of the relief demanded, and that plaintiff had failed to show any conversion of the property, the subject matter of his complaint, to which ruling defendants excepted and the exception was allowed.

IV.

That the court erred in again denying defendants' motion for a non-suit at the close of the case on the ground that plaintiff had failed to prove a case as laid in his complaint, to which ruling defendants excepted and the exception was allowed.

V.

That the court erred in again denying defendants' motion for a directed verdict at the close of the case on the ground that plaintiff had failed to sustain the allegations of his complaint or of the relief demanded therein, and that plaintiff had not shown any conversion of the property, the subject matter of said complaint, to which ruling defendants excepted and the exception was allowed.

VI.

That the court erred in denying defendants' motion for a judgment notwithstanding the verdict on the ground that plaintiff had failed to prove a case as laid in his complaint, and, further, that plaintiff had failed to sustain the allegations of the complaint or of the relief demanded therein, and that plaintiff had not shown any conversion of the property, the subject matter of plaintiff's complaint, to which ruling defendants excepted and the exception was allowed. [31]

Wherefore, defendants and appellants pray that the judgments in the above-entitled cause be reversed and the cause remanded, with instructions to the trial court as to further proceedings therein and for such other and further relief as may be just in the premises.

JOHN E. MANDERS.

DAVIS AND RENFREW,

Attorneys for Defendants, Pacific Northern Airlines, Inc., and Don Dorothy, Respectively.

[Endorsed]: Filed April 26, 1948. [32]

[Title of District Court and Cause.]

SUPERSEDEAS AND COST BOND

Know All Men by These Presents:

That we, Don Dorothy and Pacific Northern Airlines, Inc., as principals, and M. E. Diamond and C. E. Diamond, as sureties, are held and firmly bound unto C. A. McCandless, in the full and just sum of Ten Thousand Dollars (\$10,000.00) to be paid to the said C. A. McCandless, his heirs, executors, administrators, successors and assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors or assigns, jointly and severally by these presents.

Sealed with our seals and dated this 17th day of April, 1948.

Whereas, lately, at the January, 1948, term of the District Court for the Territory of Alaska, Third Division, in a suit pending in said court between C. A. McCandless, plaintiff, and Don Dorothy and Pacific Northern Airlines, Inc., a corporation, defendants, a judgment was rendered against the said Don Dorothy and Pacific Northern Airlines, Inc., a corporation, defendants at the said January, 1948, term of Court, and the said Don Dorothy and Pacific Northern Airlines, Inc., a corporation, defendants, have petitioned for and been allowed an appeal to the United States Circuit Court of Appeals for the Ninth Circuit and a citation has been issued directed to the said C. A. McCandless, citing him to appear in said court at San Francisco,

thirty (30) days from and after the date of such citation. [33]

Now the condition of the above obligation is such that if the said Don Dorothy and Pacific Northern Airlines, Inc., a corporation, shall prosecute the said appeal to effect and answer all damages and costs if they fail to make good their plea, then the above obligation to be void, otherwise to remain in full force and effect.

PACIFIC NORTHERN

AIRLINES, INC.

By JOHN E. MANDERS,

Vice-President.

DON DOROTHY,

Principals.

M. E. DIAMOND,

C. E. DIAMOND,

Sureties. [34]

United States of America,

Territory of Alaska—ss.

M. E. Diamond and C. E. Diamond, being first duly sworn on oath, depose and say, each for himself and not one for the other; that I am a resident of the Territory of Alaska owning property therein; I am not a counsellor or attorney at law, marshal, clerk of any court or other officer of any court; that I am worth the sum of Ten Thousand Dollars (\$10,000.00) specified in the foregoing undertak-

ing, exclusive of property exempt from execution and over and above all just debts and liabilities.

M. E. DIAMOND,
C. E. DIAMOND.

Subscribed and Sworn to before me this 17th day of April, 1948.

/s/ WILLIAM H. OLSEN,
Notary Public in and for the Territory of Alaska.
My commission expires: 1/21/50.

The foregoing bond and undertaking is approved and allowed this 26th day of April, 1948.

[Seal] ANTHONY J. DIMOND,
District Judge.

[Endorsed]: Filed April 26, 1948. [35]

[Title of District Court and Cause.]

ACKNOWLEDGMENT OF SERVICE

Receipt is hereby acknowledged of copies of each of the following documents on appeal in the above-entitled action:

1. Petition for Appeal.
2. Order Allowing Appeal and Supersedeas.
3. Citation on Appeal.
4. Assignments of Error.
5. Supersedeas and Cost Bond.

Dated at Anchorage, Alaska, this 26th day of April, 1948.

/s/ WENDELL P. KAY,
Attorney for Plaintiff.

[Endorsed]: Filed April 26, 1948. [36]

[Title of District Court and Cause.]

PROPOSED BILL OF EXCEPTIONS

Be It Remembered:

That this cause came on for trial before the above-entitled court, sitting at Anchorage, Alaska, on the 24-25-26-27th days of February, 1948, the plaintiff appearing in person and by his attorneys, Messrs. Cuddy and Kay, the defendant, Don Dorothy, appearing in person and by his attorneys, Messrs. Davis & Renfrew, and the defendant, Pacific Northern Airlines, Inc., appearing by its attorney, John E. Manders, Esq., and the following proceedings were had. A jury having been impanelled and sworn did at the conclusion of the trial of said action render its verdict for the plaintiff and against the defendants and found that plaintiff was entitled to recover of and from the defendants the sum of \$7500.00.

Prior to the actual trial of the foregoing action, separate demurrers were filed by each of the defendants to the complaint and thereafter each of said demurrers was overruled by the court and the defendants granted ten days within which to answer the complaint.

The minute order overruling said demurrers is as follows:

Now at this time the plaintiff not being present in court but represented by Edward L. Arnell, of his counsel, the defendants not being present but represented by [37] John E. Manders and Edward V. Davis, of their counsel. Whereupon the following proceedings were had, to-wit: Argument to the court was had by John E. Manders, for and in

behalf of the defendants. Argument to the court was had by Edward L. Arnell, for and in behalf of the plaintiff. Argument to the court was had by John E. Manders, for and in behalf of the defendants. Whereupon the court, having heard the arguments of respective counsel and being fully and duly advised in the premises, overruled demurrer Cause No. A-4725, entitled C. A. McCandless, plaintiff, versus Don Dorothy and Pacific Northern Airlines, Inc., defendants, and defendants given ten days within which to answer."

Opening statement to the jury was had by Mr. Kay for and in behalf of the plaintiff.

Opening statement to the jury was had by Mr. Davis for and in behalf of the defendants; Mr. Manders waived opening statement.

The Court: Counsel for plaintiff may call a witness.

Mr. Kay: Mr. C. A. McCandless, please.

The Court: Mr. McCandless may be sworn to testify.

CHARLES McCANDLESS,

being first duly sworn, testified in his own behalf as follows:

Direct Examination

By Mr. Kay:

Q. Will you state your name, please, Mr. McCandless? A. Charles McCandless.

Q. What is your address, Mr. McCandless—where do you live?

A. I live at the Fifth Avenue Trailer Court.

(Testimony of Charles McCandless.)

Q. And, Mr. McCandless, would you tell me what your occupation is?

A. I am a carpenter, working for B.J.L.

Q. Mr. McCandless, are you also, in addition to being a carpenter, a pilot? A. I am.

Q. How long have you been a pilot, Mr. McCandless?

A. Well, my first flying experience started back about 1924.

Q. Now, Mr. McCandless, turning back to last summer, I will ask you whether or not you were the owner of a Stinson SR9F aircraft?

A. Yes.

Q. Could you tell the jury, please, approximately when you acquired that plane, Mr. McCandless?

A. I bought the plane from United Airmotive July 15 of last year.

Q. And will you describe that plane to the jury, Mr. McCandless?

A. Well, the plane, as you say, is designated as Stinson SR9F, Gull Wing type; has a 450 HP Pratt and Whitney engine; five-place; equipped with full instrumentation, two-way radio communication, directional loop and has full flaps, Hamilton constant speed control propeller; it is equipped with new tires; the ship had just recently been completely majored in both air frame/and engine—that is, the air frame had been metalized and gone over completely and been recovered with Grade A fabric; the engine was factory majored, or over-

(Testimony of Charles McCandless.)

hailed by the factory, and was bought from the CAA. This was installed—all the instruments were completely overhauled, the radio was completely overhauled and in excellent condition. It was equipped and licensed for day or night flying; it was equipped with flares. It had hydraulic brakes, new tires, and was in generally first-class condition throughout.

Q. Now, Mr. McCandless, you stated that your occupation was [40] a carpenter. I neglected to ask you at that time how long you had been a carpenter?

A. Well, I have been a carpenter off and on ever since I have been working for the last 20—22 years. I worked for General Electric Company a number of years as a machinist—about nine years, to be exact.

Mr. Davis: You Honor, I forgot to do so previously. If there are any witnesses in the court room besides the parties, I would like to ask that they be excused.

The Court: All persons, except the parties, who are or who may be witnesses in the case are required to remain outside of the court room until individually called as witnesses. There is a witness room right directly across the hall to my right; and if counsel notice any witnesses, or persons who may be witnesses, in the room, they should advise the court immediately. If counsel know of any other persons who may be witnesses they should have them remain outside.

(Testimony of Charles McCandless.)

Mr. Kay: I see no one, your Honor, at the present time.

The Court: At the last trial a person who was called as a witness before she knew that she would be called had been in the court room about 20 minutes.

Mr. Cuddy: Your Honor, the question has just been raised. A party that is not going to be a witness—are they required to leave? Our contention is that they are not.

The Court: Parties can stay here; parties have a right to be present.

Mr. Cuddy: No, to be exact, sir, Mr. Manders just called my attention to Mrs. McCandless, who is here in the court room.

The Court: Well, if she is not a witness she may remain.

Mr. Cuddy: Thank you, sir.

Mr. Kay: May it please the Court? Mr. McCandless, I think I was asking you how long you had been a carpenter and, I think—had you completed your answer to that question?

A. I had; [41] practically all my life with the exception of the time for a period of years—about nine years, to be exact—I worked as a machinist for the General Electric Company.

Q. Now, Mr. McCandless, I will ask if you are acquainted with Mr. Dorothy, one of the defendants in this case? A. I am.

Q. Will you state the approximate date, if you

(Testimony of Charles McCandless.)

know, when you first made Mr. Dorothy's acquaintance?

A. Yes, it was on, I believe, a Wednesday evening—or afternoon—about shortly after six o'clock, in the first week in September.

Q. That would be on or about the third or fourth day of September, Mr. McCandless, to the best of your recollection?

A. I believe it was the fourth day.

Q. And will you state where that meeting took place?

A. It took place in the Fifth Avenue Trailer Court at my trailer.

Q. And, Mr. McCandless, will you, in your own words, tell the Court and jury just what took place on the occasion between yourself and Mr. Dorothy? What he said to you and what you said to him?

A. Well, as I say, on this Wednesday afternoon, I had gone—come home from work at B.J.L. I got off at six o'clock. I drove home and parked alongside the trailer where I usually do and was having some trouble with my voltage regulator on the car and I was working with that, and Mr. Dorothy came up—in fact, my wife brought him up. He had undoubtedly met her first and she brought him over and said: "Here's a man to see you." And I said: "Hello, I will be with you just a minute." And I let down the hood of the car and shut the car off and then Mr. Dorothy introduced himself. He said: "I am Don Dorothy, Chief Pilot of Pacific Northern Airlines." I think he said

(Testimony of Charles McCandless.)

PNA and I asked him what was that, and he said Pacific Northern Airlines. And he said: "I understand you have a Stinson airplane over here you want to sell." I said: "Yes. I am not just raring to sell it, but I will sell it if I can get the right price for it." He said: "What do you want for it?" "Well," I said, "\$8500 would be the least I would take for it." He said something to the effect that he thought that was rather a high price for it and I explained to him that the aircraft had just been completely majored in both air frame and engine, it was in absolutely top condition and there was at that time only some 65 or so hours on it since completely major. And he said: "Well, that they were needing a plane but he didn't know whether his company would pay that price for it or not. And I said "Well," I said, "that's the price I want for it and that's the least I will take. It's worth that much to me." And he said: "How about me taking that plane down to our hangar and let our mechanics look it over to see if it is in the condition you say it is in, and then when Mr. Woodley comes up from Seattle we can talk it over and let you know whether or not we will buy it." I said: "That will be all right. You can get the key from Stan Hill over at United Airmotive."

Q. Pardon me, just a moment. Did he indicate at that time when he expected Mr. Woodley.

A. No, he said something, if I remember correctly—a few days he said Mr. Woodley was expected up.

(Testimony of Charles McCandless.)

Q. All right, you may proceed now with what he said and what you said.

A. I told him that would be OK, that he could get the key from Stan Hill and take it down to his hangar and let his mechanics look it over, and when they get through inspecting it bring it back and tie it down where I had it. I had the corner position back of Roy Heaton's office—between Roy Heaton's office and United Airmotive. And he said OK, he would do that, and he started to walk away and then he turned around and he said: "Say, would you consider renting that plane?" I said: "Well, that all depends on the kind of proposition I am offered." [43] I said: "What do you offer?" "Well," he says, "it would naturally be on an hourly basis." and he said: "What would you want for it by the hour?" I said: "Well, I don't know. I have never rented a plane before," and, well—some hemming and hawing around, him trying to get me to make a statement as to how much I wanted and me trying to get him to make me an offer—horse trading, and dickering. Finally he said: "Here is what we usually do: For a plane of that type we offer \$35.00 an hour for actual flight time; we furnish our own maintenance, gas and oil and carry insurance on it." So I said: "Well, that sounds fair enough, but how much are you going to use it? I don't want to go and let the plane out just for an hour or so at a time. Maybe it will conflict with other plans of mine." "Well," he said, "I don't know." He said: "We are going to need a plane this Thursday or Saturday." He said: "Our Travelaire is being repaired and we think we

(Testimony of Charles McCandless.)

got to have a ship for then." So—but he still said that he didn't know just how much they would use it or if he would use it. He said he would have to see Mr. Woodley before he could let me know. So meantime, the folks in the trailer kept calling me—my wife kept calling me telling me my supper was cold. So I said: "You see Mr. Woodley and let me know," and he said: "OK," and walked away.

Q. Now, was there anything else said between you two on that occasion, or was that the final—

A. That was the final thing of it. He walked away and got in his car. He said: "I will see Mr. Woodley and let you know."

Q. Now, Mr. McCandless, what was done after that, if anything?

A. Well, there was nothing any more done on my part. I didn't see Mr. Dorothy after that and—I didn't see Mr. Dorothy after that until quite some time later. That was even after the—

Q. Of your own knowledge, do you know whether Mr. Dorothy took the plane down to the hangar or not to have it inspected? [44]

A. I didn't see it done, but over at United Air-motive they told me he had come got the key and took the plane down to the hangar and took it up for a test flight, and I was pretty het up because he took it off the ground without permission, because he didn't have any cockpit check. He might be a good flier, but I wouldn't let anybody take my plane off the ground unless I was with him the first time.

Q. Why was it you didn't observe whether or not Mr. Dorothy took the plane?

(Testimony of Charles McCandless.)

A. Why, I was working from seven until six and I didn't get home until about 6:20 every afternoon.

Q. Well now, Mr. McCandless, what happened, then, in the course of events, if you know?

A. Well, nothing else happened then through—that I know of, through Thursday, Friday and Saturday and I went to work Saturday morning. The plane was over on the line and I went over and checked the lashings on it, that is, I saw that the ropes were tight and everything, tied down properly, and I went on to work. When I come home after work at six o'clock that afternoon I saw the plane was gone. I went to the trailer and my daughters were there, and as soon as they saw me one of my daughters said: "Sit down, I want——"

Mr. Manders: Just a minute: I object to that testimony of the witness about the conversation of his daughter.

Mr. Kay: That is right.

Mr. Manders: It is purely hearsay.

The Court: Objection is sustained.

Mr. Kay: That is right. Mr. McCandless, you will have to confine yourself to the conversations that took place in the presence of Mr. Dorothy. What your daughter said to you will be a matter of her testimony, if she is called as a witness, and not your testimony.

A. Well, you have to excuse me, your Honor. I never been in court before so I don't know anything about the routines. I am just trying to tell a straight story.

The Court: That is all right. [45]

(Testimony of Charles McCandless.)

Mr. Kay: Do you, of your own knowledge, know what happened to the plane then after you saw it that Saturday morning? A. No, I don't.

Q. Now, have you seen Mr. Don Dorothy since that time?

A. Only on two occasions: One time, oh, it must have been a month or six weeks after the accident, I went into the Airport Cafe one day for lunch and I sat down beside Mr. Dorothy and kind of expected him to speak, but he didn't seem to recognize me or didn't know me, and finally I asked him: "Aren't you Don Dorothy?" He said: "Yes." I said: "Don't you remember me?" He said: "Well, your face is familiar but I don't believe I know you." I said: "Well, I am McCandless." "Oh," he says. That was all there was to it. Then I saw him over to the field there once since then, but he didn't speak to me or I didn't speak to him.

Q. Has the Pacific Northern Airlines, or Mr. Dorothy, ever returned this plane to you Mr. McCandless?

A. They have not. No one from the Pacific Northern Airlines or Mr. Dorothy has ever approached me since the time I talked with Mr. Dorothy at my trailer, on any matter. Excuse me: There was a young fellow came; said he was from Pacific Northern Airlines, after the accident. He wanted the serial number of the plane and some other information to make out an accident report. And that's the only time I have ever approached, or anything has ever been said to me by anybody from that corporation.

(Testimony of Charles McCandless.)

Q. Now, do you know where the plane is now, Mr. McCandless? A. Yes, I do.

Q. Will you tell the jury where it is and what the condition is?

A. Well, I saw the plane as it was drug in. It was pulled in behind a truck. I happened to be over at United Airmotive the day it was pulled down Fifth Avenue and I saw it; and it was taken over to Pacific Northern hangar and I walked around there to take a look at it, and it was in pretty sad shape—pretty well crushed down the top of the fuselage—that is the cabin [46] both wings were broken off, pretty well—all the radio and instruments and everything messed up with salt water and mud and battery acid all over it. In my estimation it was a complete loss.

Q. Now, Mr. McCandless, you stated, I believe, earlier that you have been a pilot since 1924?

A. No, I haven't been. I haven't held a license since 1924. I have held a license since 1939, but I was flying in 1924 as a student, which at that time we didn't require a license.

Q. Well now, how long have you been dealing in aircraft, if you have been? Tell the jury what your experience has been as far as buying and selling and dealing in aircraft is concerned?

A. I have never dealt in aircraft. Only think I have ever done, I have owned three airplanes—four airplanes—at different times that I bought for my own personal use. But I have been around air fields—been interested in aviation practically all my life—and know a little about airplanes.

(Testimony of Charles McCandless.)

Q. Do you keep yourself informed on the prices and values of aircraft, Mr. McCandless?

A. Fairly well, yes.

Q. And were you keeping yourself informed as to the prices and values of aircraft in and around Merrill Field in Anchorage, Alaska, during last summer and particularly during September of 1947?

A. Yes. I had a two-place airplane at the time and I was looking around—shopping around—trying to get a four or five-place plane, because there are five in my family and we couldn't all go out together in a two-place airplane. So I was pretty well familiar with all the prices on Merrill Field at that time.

Q. And were you thoroughly familiar with the aircraft in question, the Stinson SR9F—the aircraft owned by you at that time?

A. I had never flown a ship of that type before, but I liked the airplane and it was offered for sale at what I considered was a very good bargain and I made rather extensive investigation into it as to the value of it before I bought it. [47]

Q. All right, Mr. McCandless, do you, or did you at that time, keep yourself informed of the prices of aircraft through any journals or periodicals?

A. I get the Trade-A-Plane news all the time. It's a paper that is sent to most pilots and airports, and so forth, that publishes all the airplanes for sale or trade or for charter rent and all such stuff as that, throughout practically the whole country—the United States.

Q. Well now, Mr. McCandless, I will ask you: What was the value of your Stinson SR9F aircraft

(Testimony of Charles McCandless.)

—the condition of which you have described to the jury—on the morning of September 6, 1947?

A. Well, from my own observation of, as I say, in the Trade-A-Plane, similar planes for sale, estimates that other pilots that were in the know had made on the airplane, people on Merrill Field estimates that they had made—that plane was worth anywhere from nine to eleven thousand dollars.

Q. Would you state the reasons for your opinion in placing that valuation on the plane?

A. Yes, because planes of the same type—I had seen several advertisements in the Trade-A-Plane of airplanes of that type for sale in the United States were advertised anywhere from 85, 89—and on one occasion a plane that answered almost exactly the description of mine and condition, it was listed for \$9,500, plus ferry charges to Alaska, which amounts to anywhere from 600 to a thousand dollars, depending on how you bring it up and who brings it up.

Mr. Kay: Pardon me a moment. You may cross-examine.

The Court: Counsel for the defendant may examine.

Cross-Examination

By Mr. Manders:

Q. Mr. McCandless, how long have you been a pilot?

A. Well, I can give you the exact date by my license. I became a student pilot in 1939. Due to finances at the time I didn't get—didn't complete my

(Testimony of Charles McCandless.)

course and get my license until April 12 of 1946. I hold a private license. [48]

Q. And what does that private license entitle you to operate?

A. Any aircraft with engine, land, that I have been checked out in.

Q. Does it entitle you to carry passengers?

A. It does.

Q. For hire?

A. Nope. I could carry passengers and let them pay the expenses on the plane, though.

Q. When was this plane built? When was it manufactured?

A. I don't recall right at the time. I didn't go by when the plane was built; I went by the condition of the aircraft at the time.

Q. Do you know what model it is?

A. It is SR9F.

Q. What year model is that?

A. I think that's a '39, but I am not sure. I would have to look up the records on it.

Q. Would it be a '37?

A. I don't believe it was that old, although I say, I am not sure because I didn't look it up.

Q. Now, will you tell me on what date you had this conversation with Mr. Dorothy?

A. I haven't looked up the date, but I think it was the third of September.

Q. Third of September?

A. Third or fourth—it was on a Wednesday evening. I didn't look up on the calendar to see when it was.

(Testimony of Charles McCandless.)

Q. Wednesday evening? And what time was it?

A. Oh, shortly after six o'clock—between six and six-thirty. It generally took me about 15 minutes to drive home from work.

Q. Had you worked all that day?

A. I had.

Q. At that time you were working for whom?

A. B.J.L.

Q. What was that conversation?

A. Shall I repeat the whole thing?

Q. That's what I asked you.

A. Mr. Dorothy came up to me and introduced himself and said: "I am Don Dorothy of the PNA," and I asked him: "What's the PNA?" And he said "Pacific [49] Northern Airlines, across the street." He said: "I understand you have a Stinson for sale." I said: "Yes, I will sell it," or words to that effect. He said: "How much you want for it?" I said: "\$8,500." I said: "The plane is in perfect condition; completely majored throughout, and got 65 or so hours on it at the present time," and he made the remark to something that it seemed like a lot of money for it and I went on and explained to him all about the ship, the condition of it and so forth and so on. And he kind of talked around about the condition of the plane and said he would like to take it down to PNA's hangar and let their mechanics look it over and inspect it to see if it was in the condition I said it was. I told him that would be all right to taxi it down to his hangar and he could get the key from Stan Hill at United Airmotive, and after he looked it over to bring it back and tie it down on the

(Testimony of Charles McCandless.)

line where it was. He said OK he would. He started to walk away, and he turned around and he said: "Would you consider renting the plane?" I said: "Well, I might. It depends on what kind of proposition you can get." So I asked him what he would offer me and he asked me what I wanted on an hourly basis, and he finally said that the way they did it, when they rented a plane from someone else, that is, a plane of that type, that they paid \$35.00 an hour and furnished their own gas, oil and maintenance and carried the insurance on the plane. I said: "Well, that sounds fair enough," or "That sounds OK,"—some remark like that—and I said how much—"but how much would you use it?" He said: "Well, I don't know," he said, "Our Travelaire is in being repaired at the time and we are going to need a ship"—I think he said for Thursday or Saturday, and he said: "But I don't know whether we will use it at all or not nor how much we will use it until I see Mr. Woodley." He said Mr. Woodley would be up here in a [50] few days—or he told me that when he was talking about buying the plane. He said when he saw Mr. Woodley he would let me know. I said: "OK, when you see him if you want to use it you come back and let me know," and he said, "OK," and got in his car and drove off.

Q. That the only conversation you had with Mr. Dorothy? A. As far as I recall, yes.

Q. Where did that take place?

A. At my trailer at the Fifth Avenue Trailer Court.

Q. Did you ever have any other conversation with

(Testimony of Charles McCandless.)

Mr. Dorothy, subsequent to the one you just recited?

A. The only conversation I had to him direct was at the time I asked him—set down alongside of him in the restaurant and asked him wasn't he Don Dorothy and he said yes; and then I had a telephone conversation with him.

Q. Oh, you had a telephone conversation with him? A. Yes.

Q. When was that?

A. That was after I had been told about the accident—that the plane was crashed. I called him up on that Saturday night. I had quite a bit of trouble getting ahold of him and I was pretty stewed up about the plane being crashed, and I asked him what it was all about and what the company was going to do about it. Told him he didn't have any permission to take the airplane, and he said that he did—over the phone. I told him he didn't, that we had never entered into any agreement and I had never given him any permission to take the plane and—or even take the plane off the ground to make a check flight on it. He said: Well, that was going to be up to his company. I said something to the tune he had taken the plane and cracked it up without permission and I was expecting a check from PNA for \$8,500 to cover the cost of it.

Q. Now, how did Mr. Dorothy get the key to the plane?

A. He got it from out of the desk drawer at the United Airmotive Company. [51]

Q. Did he go in and take it?

(Testimony of Charles McCandless.)

A. I don't know; I wasn't there—like I say, what I was told——

Q. No, you can't——

A. All right; I had left the key in charge of the United Airmotive because they was doing some work on the plane for me.

Q. And on this day—whether it was the third or the fourth—the day of the conversation with you, was that the day that he took this airpalne down to Pacific Northern hangar?

A. No, he didn't take it that day.

Q. When did he take it?

A. I don't know, to my certain knowledge, but I was told he took it Thursday—the following day.

Q. Then what happened to the plane, do you know?

A. The next I saw of it it was tied down on the line where it was—where I kept it all the time.

Q. When was that you saw it?

A. Well, it was there Friday and it was there Saturday morning when I went to work.

Q. What time Saturday did you see it—I mean Saturday, September 6?

A. About between 6:30 and a quarter of seven.

The Court: If counsel will suspend we will take a recess at this time.

Mr. Manders: Very well, your Honor.

The Court: Court will stand in recess until 3:15.

(Whereupon recess was had at 3:05 o'clock p.m.)

(Testimony of Charles McCandless.)

After Recess

The Court: Without objection the record will show all members of the jury present. The witness may resume the stand. Counsel may resume his examination.

Mr. Manders: Mr. McCandless, have you ever chartered this plane before?

A. On one occasion I hired a pilot to take some construction men up to Aniak, near Bethel.

Q. Who was that charter with?

A. Morrison-Knudsen. [52]

Q. And when was that?

A. I don't recall the exact date; it was sometime in August.

Q. And what was the charter price?

A. I beg your pardon?

Mr. Cuddy: We object, if the Court please—immaterial; no part of the issues here whether he chartered the plane to Morrison-Knudsen sometime ago.

Mr. Manders: It is material, Mr. Cuddy, and it goes to the question of insurance and the method of chartering an airplane.

The Court: You may answer. Overruled. You may answer, sir.

Mr. Manders: At what rate?

A. If I remember correctly—I would have to look up my records to see—it is the only occasion I ever did and I don't remember it—it was either 50 or \$55.00 an hour.

Q. All right, now: At the time, whether it was

(Testimony of Charles McCandless.)

50 or \$55.00 per hour—whatever that figure was—you at that time furnished the pilot?

A. I did.

Q. What else did you furnish for that airplane at that time?

A. I furnished the—well, the gas and oil and the plane.

Q. Anything else?

A. That's all I know of.

Q. Did you have it insured?

A. At the time it was insured, yes.

Q. At that time it was insured? A. Yes.

Q. About that——

A. The charter was made through the United Airmotive as they had the insurance on the plane at that time. You see, I just recently purchased it and——

Q. You had just recently purchased it?

A. Yes.

Q. All right. Now——

A. And we hadn't had time to have the insurance changed around; and after that I decided that the insurance—after I checked into it, I found that the insurance rates were too high and that I wouldn't have it insured at that time. [53]

Q. Mr. McCandless, what type of insurance was that?

A. Oh, I don't know—that is, positively. It was more or less of insurance covering the airplane and the passengers—full coverage.

Q. Full coverage? A. Yes.

Q. Now, in this conversation that you had with Mr. Dorothy—you say that was a Wednesday afternoon?

(Testimony of Charles McCandless.)

A. I can't be positive. It has been so long ago, but I believe it was.

Q. Wednesday? Wednesday was the third day of September?

A. I believe that's right. This all happened—this thing has strung out here for better than six months and some of this stuff—minor details are a little hazy.

Q. Did your conversation with him first relate to the rental or to the sale?

A. The first part of the conversation related exclusively to the sale of the airplane. In other words, he talked as if the PNA would buy the ship.

Q. And did he state that Mr. Woodley was going to be here?

A. He said that he expected Mr. Woodley up within a few days. I think that was his exact words.

Q. He didn't say that they would have to notify the Seattle office, did he?

A. I don't recall whether—I don't believe he did. The way—from the gist of his conversation—you see, I didn't know Mr. Woodley; I didn't know Don Dorothy; I didn't know who PNA or anybody was at that time, and I took it from the gist of his conversation Mr. Woodley was the owner of PNA and that he was the big boss and would have to sanction any deal whatever.

Q. No, there was another conversation, as I understand your statement here, subsequent to this conversation on the third?

A. What do you mean, subsequent?

(Testimony of Charles McCandless.)

Q. Afterwards? You talked to Mr. Dorothy afterwards, did you not?

A. The only time I talked to him regarding the plane after that was over the telephone. [54]

Q. All right, when was that?

A. On the following Saturday night—the Saturday night of the plane crash.

Q. Did you talk to Mr. Dorothy then?

A. I presume it would be Mr. Dorothy. He seemed to know what it was all about and knew the conditions of everything—as well as you can know of whom you are talking to over a telephone.

Q. Was it a man or woman?

A. It was a man.

Q. Did you have another conversation with him after that?

A. None other than what I told you of at the time in the restaurant.

Q. Did you have a conversation with him on Sunday morning?

A. I believe I did call him up again Sunday morning.

Q. And where did you talk to him—at what place where you telephoning?

A. I think I called him from the office of the United Airmotive.

Q. And who was present there at that time?

A. I don't remember.

Q. Do you know the men that operate that hangar—that United Airmotive? A. Very well.

Q. What are their names?

A. There's Paul Kroenung, Stanley Hill and

(Testimony of Charles McCandless.)

Woody Epps; Frederick Shaw was there, but he is not connected with them any more.

Q. Now, with those names in your mind—were any of those gentlemen present when you talked to Mr. Dorothy? A. Over the telephone?

Q. Uh-huh?

A. I believe they were, but I couldn't swear as to who they were or who was there. I was pretty well torn up by the fact I had \$8,500 worth of airplane cracked up down on the beach and nobody doing anything about it.

Q. Now, after your talk with Mr. Dorothy on the third, did you have any conversation with United Airmotive regarding this plane of yours?

A. Oh, I talked to the fellows around there, yes.

Q. You had given permission to Mr. Dorothy, had you not, to take the plane down to Pacific Northern Airlines hangar.

A. I had, for inspection purposes only.

Q. Then what was your conversation at the United Airmotive hangar the next day with any of those owners or operators of that hangar?

A. I don't know. I talked around there quite a bit about it. I was griping quite a bit about someone taking my airplane without my permission and taking it off and wrecking it, and when I ask for a settlement I don't get the courtesy of some one coming to see me.

Q. Just a moment—that isn't the question I was asking.

A. I don't know what you were referring to. Be a little more explicit.

(Testimony of Charles McCandless.)

Q. The day following the conversations you had with Mr. Dorothy—you talked to him on the third of September, then on the fourth of September is what I am now relating to—did you have a conversation with one of the owners or operators of the United Airmotive respecting this plane?

A. I don't remember whether I was there the next day or not because they close up around 5:30 or six o'clock and if you will remember I didn't get off work at that time until six. Sometimes they were there in the afternoons; sometimes they wasn't.

Q. I am speaking of the day of the fourth of September.

A. I don't remember.

Q. You know when you went to work the day of the fourth of September?

A. At the usual time, I presume: seven o'clock in the morning.

Q. Do you know how long you worked that day?

A. All day, I guess.

Q. As a matter of fact, did you work all day that day?

A. I am pretty sure I did. However, it could be found—I presume [56] it could be found out from the employment records out there if it was necessary.

Q. If the employment record that day showed you worked a half a day, would that be right?

A. I don't know.

Q. Well, would their employment records be——

A. It seems along about that time I did have a half day off for something. I was having trouble with my car at the time and I might have taken off to fix that, but I really honestly don't remember it.

(Testimony of Charles McCandless.)

Q. All right. Now, Mr. McCandless, coming back to Thursday, the fourth of September: Did you have any conversations that day with anyone of the men at the United Airmotive respecting your airplane?

A. Well, that I can't say, sir, because every time I went in there I naturally was talking about my airplane. I was quite proud of it—just had got it and like a kid with a new toy, I guess, I was talking about it all the time. I don't know what you are driving at.

Q. Just what I say: Did you have any conversations that day with anyone at United Airmotive about your airplane?

A. If I was in there that day I probably did.

Q. Well, did you?

A. I don't know whether I was in there that day or not.

Q. Did you ever have a conversation with one of the men there at the hangar regarding a written contract about this airplane?

Mr. Cuddy: If the Court please, we would like to know the name of the man and ask it be included in the question.

Mr. Manders: Did you have any conversation——

The Court: Overruled.

Mr. Manders: Very well, your Honor.

A. I don't know. I don't know what you are driving at, sir. I am sorry.

Q. Let me ask you the question again—or will you read [57] the question, Miss Reporter?

(Reporter read the question.)

(Testimony of Charles McCandless.)

Mr. Manders: On the day of September the fourth, 1947?

A. Well, I am not positive as to that. The only thing I know of I did was talking to Freddy Shaw one day and Woody Van Epps—or Woody Epps—and I told him that Don Dorothy had been over to see me about renting the airplane and that he was going to let me know that weekend whether or not they were going to use it, and—but I wasn't going to rent it to them unless I had an agreement in writing. That might be what you are referring to, because I was at the time I was still pretty well burnt up that Don had taken the ship off the ground, as I say, without a cockpit check or even a check flight.

Q. Well, who would have checked that plane?

A. I would have.

Q. You authorized to do that?

A. It was my airplane and I was familiar with the airplane. Every airplane is different, Mister; I don't know whether you know it or not. There is no standardization of instrument control panels or controls, that is, intermediate control, and a pilot can get into a strange airplane and get fouled up pretty doggoned easy.

Q. Let me ask you: Did you hold a mechanic's certificate as authorized by the CAA?

A. I do not.

Q. Well then, you wouldn't be in a position to know say, whether that plane was mechanically correct or not?

A. I have flown the airplane.

Q. I am speaking of a check-out.

A. For a check-out, yes.

(Testimony of Charles McCandless.)

Q. You couldn't have issued a check-out?

A. I could have.

Q. You could have?

A. Yes; it was my airplane.

Q. Now, did you have any other conversations with Mr. Dorothy, or telephone calls with him, in addition to the ones you related and including the one of Saturday night, the sixth? [58]

A. I think Saturday night and Sunday morning was the only times that I talked to him.

Q. All right, now, what was that conversation Sunday morning?

The Court: Which one?

Mr. Manders: The telephone conversation of Sunday morning.

A. Well, it was more or less the same thing as it was Saturday night. I asked him if he had done anything about the airplane—if he had seen Mr. Woodley or what they were going to do about it. He said that I had rented the airplane to him and that he had cracked it up and it was my baby—something to that effect. Said they wasn't going to do anything about it. He said that—let's see, how in the heck was it? It was something about he hadn't seen Mr. Woodley yet, or something to that effect, and I said: "Well, I can't help whether you have seen Mr. Woodley or not. You have taken my airplane without permission and I want my check for \$8,500."

Mr. Manders: Has the Court the file there—the complaint?

The Court: Yes.

(Testimony of Charles McCandless.)

Mr. Manders: I would like to show that to the witness.

(Court handed the file to the witness.)

The Witness: That is——

Mr. Manders: If you will open that file, Mr. McCandless, there is a complaint in there. Would you look at page 2 of the complaint? Do you notice the second paragraph on that page is numbered in Roman numerals “V”?

A. Yes.

Q. Now, will you look at the—one, two, three, four, five—five last lines of that paragraph?

A. Yes.

Q. See if they read as I am reading it?

“That while the defendant, Don Dorothy, had said Aircraft at said towns”—referring to Kenai and Kasilof—[59] “the said Don Dorothy did at times unknown to the plaintiff convert said Aircraft to the use and benefit of the defendant corporation by engaging in the hauling of mail, freight, and passengers between said towns.” Is that correct?

A. That’s what it says here.

Q. Now, Mr. McCandless, that is your complaint in this action, isn’t it? That’s a part of your complaint in this action?

A. Well, that’s what the lawyer drew up. I don’t know anything about law.

Q. Just a minute: Will you turn to page 3? Is that your signature?

A. It is.

Q. “C. A. McCandless, Plaintiff”?

A. That’s right.

Q. Is that your signature below that: “C. A.

(Testimony of Charles McCandless.)

McCandless" and underneath that: "Subscribed and sworn to before me this 1st day of October, 1947, Edward L. Arnell, Notary Public" and so forth?

A. That's my signature, yes.

Q. And you swore to the complaint on that day?

A. Yes, sir.

Mr. Manders: That's all.

Mr. Kay: Is that all, Mr. Manders?

Mr. Manders: Just one moment. Mr. McCandless, do you have any nick name?

A. Just called Mac.

Q. You don't have a nickname of Bob, do you?

A. No, I don't.

Q. You weren't recently involved in a flight of an airplane with one ski gone, were you?

A. I landed a plane on Merrill Field with only one ski on it, yes. There was a piece in the paper about "Bob McCandless." I don't know where it came from. That was just some reporter's idea.

Q. That was you then?

A. There was a correction later, that gave my name correctly; yes.

Q. Was that plane yours?

Mr. Cuddy: Oh, we object, if the Court please—immaterial, no part of the issues here. [60]

The Court: Objection is sustained.

Mr. Manders: That's all.

The Court: Any further cross-examination?

Mr. Davis: No, your Honor.

The Court: Any redirect examination?

Mr. Kay: Pardon me just a moment, your Honor?

The Court: Yes.

(Testimony of Charles McCandless.)

Mr. Kay: No further questions, your Honor.

The Court: Have the jurors any questions? Jurors have a right to ask questions, within limitations, of course. That is all, Mr. McCandless; you may step down. Plaintiff may call another witness.

Mr. Kay: I would like to call Miss Grace McCandless. I think she will be found in the witness room.

The Court: Miss McCandless may be called.

GRACE McCANDLESS

being first duly sworn, testified for and in behalf of the plaintiff as follows:

The Court: Miss McCandless, you will save us all a lot of grief if you will speak loud from the beginning.

The Witness: All right.

The Court: It is necessary to argue with witnesses and jurors and counsel, too. It will save a lot of time and effort if you will speak loud enough for us all to hear. All right, counsellor.

Mr. Kay: Thank you, your Honor.

Direct Examination

By Mr. Kay:

Q. Will you state your name, please, Grace?

A. Grace McCandless.

Q. Can you speak a little louder than that, now?

A. Grace McCandless. [61]

Q. Where do you live, Grace?

A. Fifth Avenue Trailer Court.

Q. Are you related to the plaintiff in this case, Mr. C. A. McCandless?

(Testimony of Grace McCandless.)

A. Yes, he is my father.

Q. How old are you, Grace? A. 18.

Q. When was your birthday?

A. Day before yesterday.

Q. Are you in school? A. Yes.

Q. Now, going back to the first week in last September, Grace, were you here in Anchorage at that time? A. I was.

Q. And were you living at the Fifth Avenue Trailer Court? A. Yes.

Q. Now, on the evening of September 3, 1947, did you hear a conversation which took place outside your trailer between your father, C. A. McCandless, and Mr. Don Dorothy? A. Yes.

Q. Will you state the circumstances, Miss McCandless, under which you heard that conversation?

A. Well, they were standing right outside the trailer right underneath the window and I was seated at a table right by the window eating my supper.

Q. Could you hear what Don Dorothy was saying to your father and what your father was saying to him? A. Yes, the window was open.

Mr. Manders: I still can't hear, your Honor.

The Witness: Yes.

The Court: Can counsel hear the witness?

Mr. Manders: Just faintly.

Mr. Kay: Please try to speak just as loud as you can, Grace. A. OK.

Q. Now, I will ask you if you will tell the jury in your own words, Grace, just what took place on that occasion? Tell what Mr. Dorothy said to your

(Testimony of Grace McCandless.)

father, if anything, and what your father said to him.

A. Well, it was one night right after Dad got out of working. Mr. Dorothy came up to my father and he says: "Are you Mr. McCandless?" My Dad says: "Yes," and he said that [62] he was Don Dorothy from the PNA, and he says: "I understand that you have a Stinson plane to sell." Dad said: "Yes." He asked him how much he wanted for it and my Dad says \$8,500 and Don Dorothy seemed to think that that was quite a bit, he didn't know if the company would pay that much or not. And Dad went on to explain that it was a brand new ship, just remodeled, and everything else, and Don says well, he couldn't say for sure anything about it until he saw Woodley when he come up from Seattle, and he asked Dad if he couldn't take the plane down to the hangar and have it checked over—have his mechanic check it—and my Dad gave him permission. And then he asked him if he would consider renting it, and Dad says, well, what would he offer? And Don Dorothy told him, well, it was usually—they gave them \$35.00 an hour, gas, maintenance, oil and insurance, and then my Dad said: "Well, that sounds fair enough." And Dad asked him how much would he use it. Well, he said he couldn't say for sure because he didn't know if he was going to use it or not until he saw Woodley, and Dad said, "Well, you let me know about it;" he said, "OK, I will let you know as soon as I see Woodley if we will even use it or not." I think that was all.

Q. Now, after this conversation did you speak to your father, then, in connection——

(Testimony of Grace McCandless.)

A. Well, I was waiting for him to come in for supper. I had cooked supper and it was getting cold. I told him to come on in.

Q. Now, I will ask you if you ever saw Mr. Dorothy again after that evening, Miss McCandless?

A. Yes.

Q. And when was that?

A. It was a Saturday night, September the sixth.

Q. Do you recall about what time in the evening that was?

A. Not exactly. It was sometime that night, but I know it was before my father got out of work—about 4:30, I think. [63]

Q. And where were you on that occasion?

A. I was at the trailer.

Q. And did Mr. Dorothy come to the trailer?

A. Yes.

Q. And will you state, just tell the jury, what he said to you and what you said to him?

A. Well, first he asked if my father was there and I told him no, he was still working, and he said: "Well, I had a little bad luck today," and, naturally, I asked him what happened, and he says that he took the plane down to Kenai and landed on the beach and he hit a soft spot and the plane tipped over. And I asked him, well, wouldn't he do anything about it? You know, I didn't know the situation. And he said no, there was a big cliff there and everything and they couldn't get it up over the cliff—you know, with the tide out—and he says as soon as the tide come in it would just wash it out—it would be a total wreck. So I told him I would tell Dad.

(Testimony of Grace McCandless.)

Q. And did you have any further conversation with him then, or was that all?

A. That was all.

Q. Now, did you have any further conversations with Mr. Dorothy at any time after that that you recall, Grace?

A. I never saw him again until today.

Mr. Kay: Your witness.

The Court: Counsel for defendant may examine.

Cross-Examination

By Mr. Manders:

Q. Miss McCandless, on this afternoon of the third of September that you have just testified about, where were you at that time the conversation was held between your father and Mr. Dorothy?

A. Well, they were standing right by the window outside the trailer, leaning on the car, and the car was right next to the trailer, and I was sitting at a table right inside the trailer right under the window eating my supper, and the window was open.

Q. Were they in plain view of you?

A. Yes, I could see them. [64]

Q. You don't know whether there was any other conversation between them than what you have related here? A. That's all.

Q. I say you don't know whether there was or not?

A. I don't know. I mean, I heard everything that went on. That was all.

Q. What you heard? A. Uh-huh.

(Testimony of Grace McCandless.)

Q. But did you know whether or not there was any other conversation between them?

A. There wasn't.

Q. Did you see your father arrive?

A. Yes, I did.

Q. Did you see Mr. Dorothy arrive?

A. Well, I know my Dad just got home and at the time I believe Mr. Dorothy must have come up right at the same time.

Q. There could have been a conversation without your knowing it, though, couldn't there?

A. No, because I saw Dad's car come up and then I heard Mr. Dorothy introduce himself.

Q. Where was the automobile of your father at that time in relation to the trailer?

A. Oh, it was just a couple of feet from the trailer.

Q. Which direction was it headed?

A. Oh, I believe it's north. It was facing the back of the trailer court. I believe that's north.

Q. How many feet would you estimate the distance was between the trailer and the automobile where your father and Mr. Dorothy were?

A. Oh, it was about four feet, I imagine—four or five feet, something like that. It wasn't far. I am not positive of that.

Q. It wouldn't be ten, would it? Could it be ten?

A. I am not sure; I don't know. It wasn't far.

Q. You are not a judge of distance, then?

A. No, I don't think you better—because I don't know.

(Testimony of Grace McCandless.)

Mr. Manders: That is all.

Mr. Cuddy: No further questions. [65]

The Court: Have the jurors any questions? That is all, Miss McCandless; you may step down.

The Witness: Do I have to go back out there?

The Court: You had better remain outside of the court room because if you don't you may not be called—unless counsel agree.

Mr. Cuddy: No, we may have to recall Miss McCandless.

The Court: All right, you had better wait out there, Miss McCandless.

Mr. Kay: Your Honor, I have two more witnesses who are on their way down here.

The Court: We will take our recess now. Court will stand in recess until four o'clock.

(Whereupon recess was had at 3:50 o'clock p.m.)

After Recess

The Court: Without objection the record will show all members of the jury present.

Counsel for the plaintiff may call another witness.

Mr. Kay: Your Honor, plaintiff calls W. O. Epps.

The Court: Are there any other witnesses in the court room?

Mr. Kay: I believe our only other witness is in the witness room, your Honor.

The Court: Very well.

W. O. EPPS,

being first duly sworn, testified for and in behalf of the plaintiff as follows:

Direct Examination

By Mr. Kay:

Q. Mr. Epps, I would like to warn you that the accoustics in here are very poor, as you can notice, and that you will probably have to speak in a somewhat louder tone of voice than you ordinarily do. Would you state your name, please?

A. W. O. Epps. [66]

Q. And where do you live, Mr. Epps?

A. I live over in the V. A. housing.

Q. That is here in Anchorage, Alaska?

A. Yes.

Q. And what is your occupation, Mr. Epps?

A. Aircraft business.

Q. Are you one of the stockholders and owners of the United Airmotive Corporation?

A. That is correct.

Q. What is your age, Mr. Epps? A. 32.

Q. And how long have you been engaged in the aircraft business?

A. Oh, about six or seven years.

Q. During that time what has been the nature of your work in aircraft, would you tell the jury, please?

A. Well, I was an instructor during the war, and after the war I was ferrying and selling aircraft for the Southwestern Aero Exchange in Tulsa, Oklahoma. After that I came up here and instructed

(Testimony of W. O. Epps.)

for the Northern Air Trading Service and then we went into business for ourselves—three more fellows and myself.

Q. Have you attended any specialized schools or had any specialized training in aircraft work, Mr. Epps?

A. Nothing except the government—Army.

Q. Army training? A. That's right.

Q. Now, how long have you been in that business here in Anchorage, did you state? I am sorry.

A. About—came here a year ago last June.

Q. Since that time have you been engaged in the buying, selling and trading and repair and so on and so forth of aircraft?

A. Well, for about the last ten months I have, since we have been in business—in United Airmotive.

Q. Where is the location of your business?

A. At Merrill Field.

Q. Are you familiar with the literature and periodicals on [67] the question of value of aircraft, Mr. Epps?

A. Fairly well. We have sold quite a few since we have been in business out here.

Q. Do you try to keep yourselves fully informed on the prices and sales and deals and dickers going on around Merrill Field?

A. Well, we almost have to to survive.

Q. Now, Mr. Epps, I will ask you whether you are familiar with the Stinson SR9F aircraft that was owned by Mr. McCandless last summer?

(Testimony of W. O. Epps.)

A. Well, I helped rebuild it and I flew it some. That's about it.

Q. By rebuilding it, would you mind telling the jury just what was done, if you remember?

A. Well, the aircraft was flown up here by a CAA representative and it was sold to us through the War Assets. In rebuilding it we had to recover it, put the engine in it, reupholster it, put new tires on it. That's about——

Q. Would you tell the jury, please, what the condition of that aircraft was as you knew it in August and early September of 1947?

A. Was that after it was rebuilt? I don't remember.

Q. Yes, sir, that was after it was rebuilt.

A. It was in A-1, tip-top shape.

Q. And you consider yourselves fully familiar with the aircraft in question?

A. That is correct.

Q. Now, Mr. Epps, I will ask you what in your opinion was the value of that aircraft on or about September 6, 1947? That is the date, for your information, on which the accident took place.

A. Well, I would say it was around eight, nine thousand dollars.

Q. Would you tell the jury, please, in your own words, Mr. Epps, your reasons for that opinion?

A. Well, when we rebuilt the airplane was gone all over and we spent, I would say, three or four months rebuilding it—four of us—and it was—had a new engine in it—it was factory overhaul, which

(Testimony of W. O. Epps.)

is the same as a new aircraft engine; starts at zero hours—had all new fabrics, [68] was all metalized, all new instruments, reupholstered, and it was in A-1 shape. And the aircraft—there's no others in Alaska that I know of that is the same model as that. We took it to Fairbanks and tried to sell it; we were going to sell it because we needed the money. And we asked Wien from the Wien Alaska Airlines what he thought the airplane was worth—he was figuring on buying it because he had a Navy contract—and he said he estimated the value of it at \$11,000. So we figured it was worth \$8500; so that was our asking price when we sold it.

Q. Were you advertising it for sale at 8500?

A. I don't remember whether it had the price on it in the paper or not, but we advertised it.

Q. Now, as a matter of fact, Mr. Epps—I know you will be asked this anyway—what was the price?

A. We sold it for \$5,000 and a 1946 all metal Luscombe.

Q. And what valuation?

A. We valued the Luscombe at 2500 and sold it for \$2000.

Q. How do you explain the discrepancy between the valuation that you placed on the plane and the amount for which you sold it?

A. Well, we figured if we kept it we could get the 8500 that we were asking, but as I said we needed the money. We owed a note at the bank and we paid that note off with the difference.

Q. And you figured Mr. McCandless got a bar-

(Testimony of W. O. Epps.)

gain? A. I figure he did, yes, sir.

Mr. Kay: I believe that is all, Mr. Epps. Your witness.

The Court: Counsel for the defendant may examine.

Cross-Examination

By Mr. Manders:

Q. Mr. Epps, are you familiar with the trade journal called Trade-A-Plane Service?

A. Yes, sir.

Q. Were you familiar with that journal?

A. Yes, I am.

Q. At this time?

A. We get it twice a month. [69]

Q. Of the sale? A. Yes, sir.

Q. What year model was this airplane?

A. Let's see—I don't know just exactly what year it was built. I could look on the registration certificate and tell.

Q. Well, would it be correct if I said it is approximately the year 1937?

A. I was thinking it was a '39—not positive on that.

Q. Assuming it to be a '39, what would be the market value of such a plane on the Outside?

Mr. Cuddy: We object, if the Court please. It is not proper cross-examination. It is not fair for the valuation of the plane. The question should be, what is the value of that plane at Merrill Field.

The Court: Objection sustained.

Mr. Manders: If the Court please, I think we

(Testimony of W. O. Epps.)

are entitled to an answer to that question for this reason: The replacement value of an airplane and the market value is usually the going rate.

The Court: In the area, I think—generally in the surrounding area, Mr. Manders. That is my understanding of it.

Mr. Manders: Well, here we have a situation: Most of these planes are purchased on the Outside and brought up here. The ferrying charges are extra. The plane costs the same; it is the ferrying charge that makes the difference. I think under those conditions this witness should be able to testify—he says he is familiar with this trade journal—what is the price of such a plane as this on the Outside?

Let me put it this way, Mr. Epps—

The Court: I am dubious about it, but rather than shut out something that the jury should hear, the question may be answered. [70]

The Witness: I will give you an example: You can find lots of aircraft in the States that have a very small price on them, for instance, a Cub or anything like that—you can see them advertised in the States for 350 or \$400, but you can't find one on Merrill Field for less than \$1800.

Mr. Manders: No, I am talking of this type.

A. That type of aircraft—there isn't but just a few that was manufactured of the SR9F type with the 450 Pratt and Whitney in it.

Q. Just a few? A. That is right.

Q. What do you mean by a few?

(Testimony of W. O. Epps.)

A. Oh, I would say—I couldn't give you the exact amount, but you won't find very many in Trade-A-Plane.

Q. Well, has this plane been succeeded by larger different models?

A. No, they have different models. They have a SR9C and SR9F, SR10, 18, 19's.

Q. All right now, coming back to this plane, Outside: What could you purchase such a plane as this for on the Outside?

A. At the time we sold it? I would say six or seven thousand dollars. It might not be in as good a shape, because it wouldn't be rebuilt as well as that was. You couldn't find one advertised just rebuilt for that price, I don't believe.

Mr. Manders: Assume it was in its original state—had never been damaged—and let's say had a hundred hours' use—the same type of plane?

A. In the States?

Q. Yes.

A. I would say around 7000.

Q. On the second hand market?

A. That's right.

Mr. Manders: That is all, your Honor.

The Court: Is there any redirect examination?

Mr. Kay: Just one question, your Honor, please.

The Court: Yes.

Redirect Examination

By Mr. Kay:

Q. In response to the last question by Mr. Manders you stated that the value of such a plane in

(Testimony of W. O. Epps.)

the States would be approximately \$7000. Is that the plane in the condition in which this plane was?

A. I wouldn't say it would be in as good a condition, because this was entirely rebuilt, but he said one that had maybe a hundred hours on it. It is according to what kind of material they put in it and what kind of work they did on it. There is a difference there.

Mr. Kay: I believe that's all, your Honor.

The Court: Have the jurors any questions?

Mr. Manders: Let me ask you this question, Mr. Epps:

Recross-Examination

By Mr. Manders:

Q. After this plane was rebuilt by you, had you made use of it? A. Yes, we did.

Q. Did you charter it?

A. We used it in our own business, made a few trips to Fairbanks to see about jobs—rebuild jobs.

Q. And how much had it been used before it had been sold to Mr. McCandless?

A. Oh, the aircraft had about 40 hours on it, I guess.

Mr. Manders: Yes.

The Court: That is all, Mr. Epps—Pardon me, are you through?

Mr. Manders: Just a moment, your Honor. That's all.

The Court: That is all, Mr. Epps. Pardon me; wait a minute.

A Juror: May I ask one question? You said this

(Testimony of W. O. Epps.)

engine had been factory overhauled. Who did this overhaul?

The Court: Pardon me, I didn't hear the question.

A Juror: He stated the motor had been overhauled. I asked who did the overhaul?

The Witness: The Pratt and Whitney Aircraft.

A Juror: Pratt and Whitney?

The Witness: Yes, ma'am. [72]

The Court: That is all. Do you wish to keep this witness here or may he be excused and return to work?

Mr. Kay: As far as we are concerned, he may be excused.

The Court: Have you a telephone at your shop?

The Witness: I have a telephone: Black 725.

The Court: Do counsel for the defendant wish him to stay?

Mr. Davis: Not at this time, your Honor. We may wish to recall him as our own witness.

The Court: You may return to work, then. Another witness may be called.

Mr. Kay: Like to call Paul Kroenung.

PAUL KROENUNG,

being first duly sworn, testified for and in behalf of the plaintiff as follows:

Direct Examination

By Mr. Kay:

Q. Mr. Kroenung, the acoustics in here are very

(Testimony of Paul Kroenung.)

poor, so it will be necessary for you to talk a little louder than you ordinarily do so that all may hear you. Will you state your name, please?

A. Paul Kroenung.

Q. Where do you live, Mr. Kroenung?

A. In the Veterans' housing.

Q. And what is your occupation?

A. We are in the aircraft sales and repair and service work.

Q. Are you one of the owners of the United Air-motive Corporation? A. Yes, sir.

Q. How old are you, Mr. Kroenung?

A. 29.

Q. And how long have you been engaged in the business in which you are now occupied?

A. I have been actively engaged about—almost about three years, and I have been acquainted with aircraft for the last eight years. [73]

Q. Did you attend any specialized school or have any specialized training on aircraft?

A. In the Army.

Q. How long have you been engaged in this business here in Anchorage, Mr. Kroenung?

A. Two years.

Q. Where is the location of your establishment?

A. Merrill Field.

Q. In the course of your business do you keep yourself informed on price and valuation of aircraft, Mr. Kroenung? A. Yes, sir.

Q. Do you sell—deal in aircraft?

A. Yes, sir.

(Testimony of Paul Kroenung.)

Q. Are you familiar with the Stinson SR9F plane owned by C. A. McCandless last summer?

A. Yes, sir.

Q. And was that plane previously owned by you? A. Yes, sir.

Q. Are you fully familiar with the condition of that aircraft at that time, Mr. Kroenung?

A. At what time, sir?

Q. At the time when you sold it to Mr. McCandless? A. Yes, sir.

Q. Will you tell the jury briefly, please, what condition that aircraft was in?

A. Well, the airplane was in practically A-1 shape. It had a new engine in it, and when I say new engine I am referring to a factory majored engine that was majored by the factory. The fuselage and wings were recently recovered and had approximately 20 coats of dope on; it had a semi-gloss finish on it and the inside was newly upholstered. All the instruments were taken out of the ship, checked and were in working order.

Q. Were you generally familiar with that aircraft after the time when you sold it to Mr. McCandless? A. After the time?

Q. Yes.

A. Yes, sir; reasonably so.

Q. Now, from your knowledge of that particular aircraft and from your general business knowledge of prices and conditions at Merrill Field at that time, I wish that you would state your [74] opinion as to the value of that aircraft about September 6, 1947?

(Testimony of Paul Kroenung.)

A. My opinion the price of the aircraft would be \$8500.

Q. And will you tell the jury, please, your reasons for that opinion?

A. Well, that type of aircraft isn't known in the States and it has a larger HP engine than you would find on other Stinsons of the same class, and with the added HP on the engine they have better performance, which would make that aircraft cost more than other similar aircraft of the same make.

Q. What was the cruising speed of that aircraft, if you know?

A. Well, if I remember correctly, at about 10,000 feet it cruised about 150.

Q. And what was the passenger capacity?

A. Five.

Mr. Kay: I believe that's all, Mr. Kroenung. Your witness.

The Court: Counsel for defendant may examine.

Cross-Examination

By Mr. Manders:

Q. Mr. Kroenung, what model airplane was this? A. It was a SR9F.

Q. What is the difference between a SR9F and a SR9E?

A. The SR9E, as I understand it, was a heavier-built airplane, and I am not sure whether it had a 450 in it or not.

Q. SR9G?

A. I really don't know. I mean, when you get

(Testimony of Paul Kroenung.)

in the letter of the SR9 series they may have a different letter on it where there would be only a small difference in the aircraft—maybe another tube put in a wing or some other difference that would have to be looked up in the CAA manuals to find the difference on them.

Q. Is there any difference between those models as to passenger capacity?

A. The heavy wing Stinson, the SR9, was—normally was a three-place airplane, where the 9F was five-place airplane. It depends a lot on each of the individual aircraft of [75] the equipment that was in it. I mean, the model does not necessarily mean the capacity of carrying the passengers.

Q. Well, now, in this airplane you are referring to here—this model F—that had capacity for five?

A. That particular one did. Other SR9F's may not have the capacity for five.

Q. And those five, were they in addition, or did they include the pilot?

A. They include the pilot.

Q. In other words, it is four, then, and the pilot?

A. Yes, sir.

Q. Did I understand you to say that this plane was yours?

A. It was owned by our organization.

Q. It was owned by your organization? Did you do the work on this plane?

A. Yes, sir.

Q. And what frame did you have for it?

A. Beg pardon?

(Testimony of Paul Kroenung.)

Q. The frame—fuselage?

A. I don't understand your question.

Q. Well, what I want to ask you, Mrs. Kroenung, is: Did you buy this plane from some other person? A. We bought it from the CAA.

Q. And what did you pay for it?

Mr. Cuddy: We object, if the Court please, unless it is shown that it was in the same condition as when they sold it.

The Court: No—overruled; you may answer.

Mr. Kay: You may answer that question.

The Witness: We paid 1700 and some odd dollars—I don't remember offhand.

Mr. Manders: To the CAA? A. Yes, sir.

Q. Is that the agency?

A. Yes, sir. I think—I think the airplane came from War Assets, actually. I think the CAA turned it over to War Assets.

Mr. Manders: And when you got that plane was it at that time in flyable condition?

A. No, sir.

Q. What was wrong with it?

A. Well, it didn't have an [76] engine in it, the fabric had to be taken off of it, it wasn't air-worthy and stringers had to be replaced and the interior had to be finished, the instruments had to be taken out and checked, and—well—actually, there wasn't anything left there but the frame. The wings weren't on it.

Q. The frame and instruments?

A. I say, the wings weren't on the fuselage.

(Testimony of Paul Kroenung.)

Q. I understand that, but I understood you to say you took the instruments out and check them?

A. Yes, sir.

Q. Then it did come with instruments?

A. Yes—well, part were in the airplane and part were not in the airplane.

Q. But it was complete with instruments?

A. Yes, sir.

Q. And it did not have a motor?

A. Well, the motor was with it, but it was in a crate.

Q. Then it did come with a motor?

A. Yes, sir.

Q. But it wasn't in place, is that it?

A. That's right, sir.

Mr. Manders: That's all.

The Court: Mr. Kay?

Redirect Examination

By Mr. Kay:

Q. Approximately how long after you purchased that from the War Assets did you and your organization work on that plane, putting it in the condition which it was when you sold it, Mr. Kroenung?

A. Well, I would say it was about five months.

Q. During all of which time your organization was working on that plane off and on?

A. Not continually. It is kind of hard to say, actually, the length of time in a day, but for a month and a half or two months we worked on it continually. After that time we worked on it—well, whenever we could have a part that we needed for

(Testimony of Paul Kroenung.)

the airplane, or have some part checked or something we would take it off and have it checked and then replace it on the airplane—or waiting for parts that we had to [77] put on the airplane.

Q. And what was your statement as to your opinion of the fair value of that plane on September 6?

A. In my opinion the fair value would be 8500.

Mr. Kay: That is all.

The Court: Have the jurors any questions? That is all, Mr. Kroenung. Do you stipulate that this witness may be excused to return to work?

Mr. Davis: Yes, your Honor.

Mr. Kay: Yes, your Honor.

The Court: Will you be available if you are needed again?

The Witness: Yes, sir.

The Court: Very well. Another witness may be called.

Mr. Kay: Plaintiff rests, your Honor.

The Court: Plaintiff rests. Defendants may call a witness.

Mr. Davis: If the Court please, it is now 4:30. I wonder if we could adjourn now and go ahead in the morning. I believe we will be able to put on our proof and have it on by noon, which will leave the afternoon for argument and instructions to the jury.

The Court: All right. I wonder if everybody would be agreeable to coming in at 9:30 tomorrow, so we would be sure to finish the case before late at night? What about the jury? Can you be here

at 9:30 without embarrassment? I know counsel can be—they undoubtedly get up early in the morning. The trial, then, will be continued until 9:30 tomorrow morning.

(The Court then duly admonished the trial jury about discussion of the case, and court was adjourned at 4:30 o'clock p.m.)

On Wednesday, February 25, 1948, at 9:30 o'clock a.m., the following further proceedings were had:

The Court: Roll of the jury may be called. [78]

On Wednesday, the 25th day of February, 1948, and prior to the jury receiving the case for its deliberations and verdict, defendants made a motion for non-suit wherein the following proceedings were had: [79]

(Jurors in the box all present.)

The Court: Are you ready to proceed, Mr. Manders in the absence of Mr. Davis and the defendants?

Mr. Manders: Yes, your Honor. At this time I have several motions I would like to make and ask that the jury be excused for the present.

The Court: Ladies and gentlemen of the jury, you may retire to the jury room until recalled.

(The jury retired.)

The Court: You may proceed, Mr. Manders.

Mr. Manders: If the Court please, in this matter the defendants are making a motion for non suit based on the ground that the plaintiff has failed to prove his case as laid; and further, a motion for a

directed verdict on the ground that the plaintiff has failed to sustain the allegations of his complaint as to the relief demanded and has not at this time shown any conversion of the property referred to in the complaint.

The law seems to be: In the case of *Wm. L. Hughson Co. v. Northwestern Nat. Bank of Portland*, Supreme Court of Oregon, 268 Pac. 756, the general proposition of law is this:

“Disturbance of owner’s possession is gist of ‘trespass,’ while ‘conversion’ is wrongful exercise of ownership in denial of rights of owner.”

Now, that’s the general law of conversion; it is the general law of trespass. There may be a trespassing but it is not a conversion.

And from the case of *Rogers v. Huie*, 56 Am. Dec. 363—it is a California case:

“Conversion is gist of action of Trover, and without conversion, neither possession of the property, negligence, nor misfortune will enable the action to be maintained. [80]

“Trover will not lie unless defendant has converted property to his own use; and if not, then any other act to amount to a conversion must be done with a wrongful intent, either express or implied.”

And the Alaska case, *Davison v. Alaska Banking Co.*, 5 Alaska, 683, I just read from the syllabus, No. 4. This is on Acts of Conversion:

“The bank committed two acts of conversion in this case: First, when the defendant bank first received the property, the evidence shows that it received it for general deposit, and failing to place it

to the credit of the plaintiff was an act of conversion; second, the cashier of the bank gave prior instruction to the bank clerk not to open or deposit the money to plaintiff's credit when received. It was received with instructions to deposit to plaintiff's credit, without notification to the plaintiff that his order would not be obeyed. These acts constituted an act of conversion."

Now there is nothing of that kind in this case at the present time.

On the grounds on which the motions have been made, I move the Court for a judgment of non suit and directed verdict.

Mr. Davis: If the Court please, I would like to concur in the motions of Mr. Manders on behalf of the defendant Dorothy and I submit it without argument on my part.

The Court: The motions are denied and the jury may be recalled.

The minute order denying the motion of defendants for non-suit reads as follows:

"Now came the trial jury who, on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of Cause No. A-4725, entitled C. A. McCandless, plaintiff, versus Don Dorothy and Pacific Northern Airlines, Inc., a corporation, defendants, was resumed.

At this time John E. Manders, of counsel for defendants, moves the Court that the jury be excused pending arguments on points of law; jury excused.

At this time John E. Manders, of counsel for de-

fendants, moves the Court for non-suit on grounds that plaintiff has failed to prove his case as laid; and for a directed verdict on grounds that plaintiff has failed to sustain the allegations of his complaint as to relief demanded and has failed to show conversion of property as claimed in complaint.

Edward V. Davis, of counsel for defendants, concurs in motions in behalf of defendant Don Dorothy.

Motions denied, and the trial jury recalled.

Don Dorothy, being first duly sworn, testified for and in his own behalf.

At 10:35 o'clock a.m. Court duly admonished the trial jury and continued cause to 10:45 o'clock a.m."

(Jury was recalled.)

The Court: Without objection the record will show all members of the jury present. Defendants may call a witness.

Mr. Davis: I would like to call Mr. Don Dorothy.

The Court: Mr. Dorothy may be sworn.

DON DOROTHY

being first duly sworn, testified for and in behalf of the defendants as follows:

Direct Examination

By Mr. Davis:

Q. Where do you live, Don?

A. 1030 Third Avenue, Anchorage, Alaska. [82]

Q. How long have you resided in the Territory of Alaska? A. About four years.

Q. By whom are you employed? A. Now?

(Testimony of Don Dorothy.)

Q. Now. A. The Army.

Q. And where were you employed in the early part of September of 1947?

A. Pacific Northern Airlines.

Q. What was your position with Pacific Northern Airlines? A. Pilot.

Q. Will you tell the Court and jury, Mr. Dorothy, what your experience has been in connection with airplanes?

A. Well, I have learned to fly in 1927 and I have been at it most of the time ever since, instructing and planting rice and dusting crops and the selling and ferrying of airplanes; and during the war I was employed by the Army as instructor and as a pilot, towing gliders; and I came up here and went to work for Pacific Northern Airlines, I think it was in 1944.

Q. What type aircraft license do you hold, Mr. Dorothy? A. Commercial.

Q. And what type planes are you entitled to fly?

A. Oh, most anything. I have single engine rating and multi-engine ratings and land and sea.

Q. Does that cover pretty nearly any equipment that flies, Mr. Dorothy?

A. Practically, except for helicopters and things of that nature.

Q. Is your license broad enough to cover flying a Stinson such as is described here? A. It is.

Q. Have you flown such aircraft?

A. Yes, ever since they made them.

Q. In the course of your business with aviation,

(Testimony of Don Dorothy.)

Mr. Dorothy, have you followed the various types of planes and know something about the value of planes?

A. Yes, that's just one of the features of the business. It is just something that you do all the time. [83]

Q. Now then, bringing your attention to the first week in September of 1947, what were you doing for Pacific Northern at that time, Mr. Dorothy?

A. I was flying the inlet run to Kenai, Kasilof, Ninilchik and Homer.

Q. And how often is that run scheduled with Pacific Northern?

A. Three days a week, Tuesday, Thursday and Saturday.

Q. What does it cover? What sort of things are hauled on that run?

A. Well, on Tuesday and Saturday we hauled mail in addition to freight and passengers and their baggage, and the same applied to Thursday except on that day there was no mail.

Q. Did you haul general cargo, then, in addition to property, persons and mail?

A. That's right.

Q. Anything that might be offered to be hauled?

A. That is right.

Q. Now, do you know as to whether or not Pacific Northern is certified for that route?

A. I do know that they are, yes.

Q. How long had you been making that run in the month of September, Mr. Dorothy?

(Testimony of Don Dorothy.)

A. I had been on that run exclusively over three years.

Q. Are you familiar with the various air fields and the various landing places along that route?

A. Yes, every one of them.

Q. Landed on all of them frequently, have you?

A. Yes.

Q. Does that include the beach here in question—the beach where you landed this Stinson?

A. Yes, that beach and other beaches too. There's lots of places where we use beaches.

Q. Had you landed there frequently?

A. Yes, practically every trip, the reason being there is a large cannery about a quarter of a mile from this beach and there is as much business in and out of the cannery as there is in and out of the Village of Kenai. [84]

Q. Tell the jury where the various things are situated at Kenai—the physical set-up there.

A. Well, the village is right at the mouth of the river on the north bank, and the air strip—the south end of the air strip is right up against the village—there's houses right at the end of the runway. And then up the river to the east about a quarter of a mile is the CAA housing site and also another little cannery; and then the river makes a big curve there toward the south again and around that curve a mile or so is this Libby's cannery, and the fact that the river makes this big curve brings the cannery back to within a quarter of a mile of this beach. And this beach—there was some reference made yesterday to

(Testimony of Don Dorothy.)

there being a cliff there. There's no cliff there. At that point it is perfectly flat and there is a road runs from the cannery and you can drive right down on the beach with a truck and the beach is miles long there and it is in better condition than the air field because the tide resurfaces and reconditions it every time it comes in.

Q. Will you describe for the jury the air strip on the Kenai side?

A. Well, it is referred to as sanded gravel, and when the wind blows it is quite dusty and has soft spots in it. They built the field originally with the view to black topping it, but they spent the black top money somewhere else and never surfaced it.

Q. It has gravel surface?

A. Yes, sandy gravel—quite dusty.

Q. How long is the runway on that?

A. 5500 feet.

Q. And what is the surface of the beach?

A. Well, it's what would be referred to as just gravel—not sanded gravel. It's, oh, small size pebbles, big as your little fingernail maybe.

Q. Now, does the beach slope off either way?

A. Yes, it slopes toward the water. Some places down there the beaches [85] are steeper than others and this beach is one of the flatter type. It has quite a little slope to it, but not enough to bother.

Q. How far is it from the air field over to this cannery beach? A. About a mile and a half.

Q. Now, then, Mr. Dorothy, going back to roughly the third of September, 1947, what if any-

(Testimony of Don Dorothy.)

thing did you do concerning your job as pilot for Pacific Northern Airlines that you have just mentioned?

A. Well, on the third of September, that being a day that I wasn't actively engaged in flying—there were other little duties I had—that afternoon I went to see the chief pilot to find out what we were going to use for an airplane for the following days' schedules inasmuch as our Travelaire was broken down and was in the hangar being repaired.

Q. Was the Travelaire the plane that you had been flying on that run?

A. That's the one that I had been flying for the past several years.

Q. And what was that?

A. It was in the hangar being repaired.

Q. All right, go ahead and tell your story.

A. In talking with the chief pilot he suggested that we find an airplane that we could rent for the next few trips, so he instructed me to go out to Merrill Field and look around and see what was available; and I ran into this Stinson owned by Mr. McCandless. However, I didn't know who owned it, so I went into United Airmotive's hangar to ask them, knowing they had owned it at one time, and they told me that Mr. McCandless owned it and where he lived in their trailer court and that he got home about six o'clock. So it was a little after six I went out there and met Mr. McCandless. He was working on his automobile out in the road near his trailer—I guess 30 or 40 feet away from the trailer.

(Testimony of Don Dorothy.)

I waited until he got through with his work and put the hood down and then I told him who I was and what I wanted. I asked him if he was the owner of that Stinson and if it was available for charter, and [86] he said it was and I asked him what his hourly rate was and he said he hadn't established one, or didn't know just what it would be worth and wanted to hear a proposition from me. So I told him if we were to rent a similar aircraft from somebody like Peterson, who has a number of those Stinsons of that general type, that we would pay him about \$35.00 an hour and we would furnish the gas and oil and ground handling and so forth and the liability insurance, which we, of course, already have. And he said well, that sounded like a good deal to him; and I went on to explain to him that the next day being Thursday and there being no mail, we might not make the trip in the event no passengers showed up, but I said we definitely would need it on Saturday because that was mail day—we went, passengers or no. So he said that that was OK and he said I could get the key to the airplane from the boys at United Airmotive. So I said: "OK, then, it's agreed that we will use it tomorrow if the need arises, or Saturday if our Travelaire isn't finished by then," but I was very sure that it wouldn't be.

So then I asked him if he was interested in selling the airplane and he said yes, he wanted \$8500 for it, and I told him that I thought that sounded like too much money for that particular airplane, however, I would like to have our mechanics check it

(Testimony of Don Dorothy.)

over and we make a report to the Seattle office with the recommendation that they buy it, and very possibly the company would make him an offer for it. So he said OK, and I told him that in the event tomorrow—which was Thursday—that I wasn't busy and didn't have to go out and we didn't use the airplane for this flight that I would like it over to our hangar and have the mechanics check it over. And he said that was OK. I believe the expression I used was that I would "fire it up and take it around in our yard." And he said that was OK, and so I told him I would let him know about anything I could hear from the [87] Seattle office about buying the thing. And he said "OK" and with that I left.

And when I got home that evening I called the chief pilot on the phone and told him about the deal that I had made and he said that sounded like a good deal; and that took care of that.

So, let's see, the next thing happened was the following day—I don't know what time of day it was. I think it was in the middle of the day sometime—early afternoon. I went out and I got the key from the boys at United Airmotive and went over and unlocked the airplane and looked it all over and untied it and fired it up, took it around in our yard and had our mechanics check it over; and we established its condition and recommended a price for it, and then I give it a test hop around the field and came back, and I put 20 gallons of gas in it from Jack Carr's pumps and charged it to Pacific Northern, and returned the airplane to its parking spot

(Testimony of Don Dorothy.)

and tied it down and blocked it up and returned the key to United Airmotive.

So then the next day—Friday afternoon quite late I was in United Airmotive's hangar and told them I would need the airplane for the following morning's trip—that's Saturday morning, September 6. And they said: "OK," they said, "you better take the key now because we might not be here as early as you want it" the next morning. So they gave me the key and I went on home.

Next morning, Saturday, I guess it was about 8:15 or 8:20 I got the airplane and took it over in front of Jack Carr's place and we gassed it up completely that time and moved it over in front of our building—Pacific Northern's building—and loaded it full of freight and mail, and about nine o'clock I took off for Kenai.

I arrived at Kenai and unloaded everything that was in the airplane, even including my flight kit which contains a gun and [88] cigarettes and tracer bullets and maps and a few little medical supplies and stuff—weighs about 14 pounds—left that in Kenai because I was going to make a lot of little short ferry trips between this beach and the field. The idea there was a Pacific Northern Airlines Douglas following me and they were to land at Kenai and pick up a couple of passengers for Homer, and those passengers were on Libby's beach so I was to bring those passengers over first and leave them for the Douglas and he would take them on to Homer, and on the way back from Homer he would

(Testimony of Don Dorothy.)

again stop at Kenai and pick up about eight more passengers I was going to ferry over from the beach to the field, and then he could go on home and I would go on with my mail flying down there. However, I took off from Kenai—must have been then about ten o'clock, I would say—and went over, and I flew down this beach without landing once to check the—you know, for any piece of something that might have floated up there that you might not see a mile away, and turned around and landed on the thing. And there's an area there of about 3000 feet that I expected to use, and after landing I taxied the entire length of this area, just checking—you know, for any soft spots or just seeing how this particular airplane operated on that beach, and everything was fine. I turned around and taxied back then clear back to the north end—all landings were made that day south bound because the wind was from the south—taxied clear to the north end and then back to the middle of the strip where the passengers were standing. I guess they began to think I was crazy, taxiing by them all the time. So I stopped and loaded on these two Homer passengers and all their baggage and taxied back to the north end and took off south bound and went over and landed on the Kenai field. And I made a mental note at the time the Kenai field was the one to bear watching because of soft spots, and the beach was much firmer. And I unloaded the passengers and they [89] went over to the side of the field with their baggage to wait for the Douglas.

(Testimony of Don Dorothy.)

And I took off and landed on the beach again within two or three feet of the place I had landed the first time—I could see my wheel marks there—and I rolled along about a hundred feet, and the tail was down and as the airplane slows down and its entire load falls on the wheels, and the wing is of no effective use, it becomes necessary to apply the brake on the low side of the airplane, that is, on the down hill side, because an airplane with a 360 degree full swivel tail wheel, it tends to caster up hill. In other words, the weight of the tail——

Mr. Davis: Now, what do you mean “caster up hill”?

A. I am just coming to that. The weight of the tail and the fact that the tail wheel is not controlled from the rudder lets the tail wheel slide down hill. It is going down the beach straight ahead, but it also wants to follow the line of least resistance which, like water does, it goes down hill. So it becomes necessary to hold the airplane in a straight path with the use of, in this case, the right hand brake because the right hand side of the airplane is on the low side. And the brake was effective for, or, I guess about a hundred feet, and as I increased the pressure on the brake, why, pretty quick the right wheel dug in and I thought that I hit a soft spot, and so that—the fact that the right wheel dug in turned the airplane about 30 degrees to the right and I was still rolling, oh, probably 50 miles an hour, and before anything could be done about it I was out into the mud—you know, where the sloping

(Testimony of Don Dorothy.)

beach ends and the mud flats begin. Of course, the tide was out and the water was out another hundred feet or so. And the minute I hit the mud over on her back she went. I was banged up a little, nothing very serious, and I got out and grabbed out of the airplane what I could get out, [90] which was nothing but a cushion and the head set and the microphone, and I had difficulty in walking—I got a smack on the leg—and a bunch of passengers standing there come running down. And I had to walk out on the wing out to the gravel because the entire airplane was lying in the mud and I don't think the mud there will support the weight of a person. Then I went back up and looked at the place where the wheel dug in and there seemed to be kind of a mound of gravel there—soft gravel. And I didn't know until the salvage crew went down there that the brake had locked, because the airplane was upside down and the wheels sticking up in the air, and at no time did the tide ever come up high enough to cover the wheels—just barely came up high enough to cover the fuselage itself. But when the salvage crew went down a few days later to look——

Mr. Kay: We object to any testimony concerning what the salvage crew found, unless it is to his own knowledge.

The Court: Objection is sustained.

Mr. Davis: Were you down there with the salvage crew?

A. No, I wasn't.

Q. All right, then, you shouldn't testify to it.

A. Anyway, I went back and looked at this soft

(Testimony of Don Dorothy.)

mass and the wheel had made a trough there—a track in the gravel about six inches deep. So Libby's had a truck, then, and they took me over to their cannery and we got a boat and went back to the Kenai field and boarded the Douglas when it was north bound and came back to Anchorage and made a report on it.

Q. Now, Mr. Dorothy, referring back to the conversation you had with Mr. McCandless, was the little girl who testified yesterday—was she present during that conversation? A. No, she wasn't.

Q. Was she where she could have heard the conversation?

A. I don't think so, because it was 30 or 40 feet between where the [91] car was parked and the trailer.

Q. At the time you left that conversation did you consider that you had made a deal with Mr. McCandless to rent that airplane?

Mr. Kay: I object to that question. It calls for a conclusion of the witness. The facts speak for themselves—what was said.

The Court: Objection is sustained.

Mr. Davis: Mr. Dorothy, did Mr. McCandless ever have any conversation with you after that time prior to the crash?

A. Not prior to the crash.

Q. Did he ever do anything to indicate to you you should not go ahead and make use of the plane?

A. No.

(Testimony of Don Dorothy.)

Mr. Kay: Object to that unless the witness knows.

The Court: Overruled.

Mr. Davis: Did Mr. McCandless get in touch with you at all about not taking that plane after you had this conversation with him?

A. No, not at all. As far as I was concerned the deal was——

The Court: Never mind, you need not state your own conclusions, Mr. Dorothy. Just answer the question.

The Witness: What was the question, now?

Mr. Davis: I want to know whether or not Mr. McCandless, after your conversation on September 3 did anything—talked to you in any way—to indicate to you that you shouldn't take that plane?

A. No, not at all. The deal was finished—it was all consummated, so far as I was concerned.

Mr. Kay: Your Honor, I think the witness is violating the injunction which you just placed upon him.

The Court: The witness has violated it. Does counsel object?

Mr. Kay: I would like to have that remark stricken from the record.

The Court: The remark may be stricken and the jury is instructed to disregard it. [92]

Mr. Davis: Would you specify what should be stricken, your Honor?

The Court: "The deal was consummated so far as I was concerned." He was asked a question as to

(Testimony of Don Dorothy.)

whether Mr. McCandless did or said anything to indicate anything else and he said "no." And then he continued by saying "it was a closed deal so far as I was concerned." That remark was his own conclusion and may be stricken.

Mr. Davis: Thank you, sir. Now, go down to the time after the accident, Mr. Dorothy, and tell the Court and the jury what you did after you returned to Anchorage?

A. Well, let's see: That afternoon I went out to—in company with another Pacific Northern Airlines official. I went out to Mr. McCandless' trailer and hoping to catch him home, being it was Saturday afternoon, but he wasn't there, and I told his daughter—the little girl that was on the stand yesterday—that we had had an accident with the airplane and for Mr. McCandless to get in touch with the firm's attorney, which was Mr. Manders. And she said that she would tell him. I believe I told her that the airplane was upside down in the mud flats down by the beach at Libby's. And I went on home and I went to bed quite early because I had a smash in the chest and my leg hurt, and that night about—I think it was 10 or 11 o'clock—quite late after I was asleep, Mr. McCandless called up and talked to my wife, but my wife wouldn't get me up.—

Mr. Cuddy: Wait a minute: We object, if the Court please, what his wife said.

Mr. Davis: He didn't say anything about what his wife said.

Mr. Cuddy: He started to.

(Testimony of Don Dorothy.)

Mr. McKay: He started to testify about a conversation between his wife and Mr. McCandless. [93]

Mr. Davis: Your Honor, there wasn't any such thing.

The Court: Overruled. Do not repeat any conversation your wife had with Mr. McCandless.

The Witness: No.

Mr. Davis: Go ahead, Don.

A. So I didn't know about this telephone call until the next morning, and it was quite early—or about nine o'clock. Mr. McCandless called again and that time—that occasion I talked to him. And I asked him what this business was I heard about he claimed I took the airplane without his permission; and he said that was correct, and we haggled back and forth and he said he had told the United Airmotive boys not to give me the key any more after I had test flown it on Thursday, and I asked him why they gave me the key and he said he didn't know. And I could hear some voices in the background. And I asked him if he was in United's hangar and he said he was. And I said: "Let me talk to Woody," so he put Woody Epps on the phone and he told me he didn't know anything about this not giving me the key business. He didn't know anything about that. I told Mr. McCandless his quarrel wasn't with me, but it was with Pacific Northern and I would recommend he go to see Mr. Manders and see if they could come to some settlement. After all, I just worked there and it wasn't any of my affair. So I guess that was the end of that

(Testimony of Don Dorothy.)

conversation and I never talked to him again until the time he refers to in the restaurant. We had quite a little conversation there.

Q. Was that conversation in the restaurant before or after this suit was brought, Don, or do you know?

A. Well, I don't know. It was six weeks or a couple of months, I would say, afterwards. I don't know whether the suit was filed yet or not.

Q. Did Mr. McCandless ever make a demand on you personally for \$8500?

A. No, he never did except that Sunday morning when [94] he was talking on the phone he said he was looking for a check for \$8500, and I told him I was sorry I couldn't supply him with a check for that amount, and I again referred him to Mr. Manders.

Q. Did you at any time, Mr. Dorothy, assert ownership over this plane? Did you ever claim that the plane was yours? A. Why, no.

Mr. Kay: Object to the question, your Honor. It is obviously calling for legal conclusion.

The Court: Objection is sustained.

Mr. Davis: Your Honor, I don't understand the objection or the ruling of the Court. I asked him if he had ever asserted ownership of the plane. That doesn't call for a conclusion.

The Court: He can tell what he did and said. If he claims it as being his that is his own mental conclusion.

Mr. Davis: Well, Mr. Dorothy, did you say any-

(Testimony of Don Dorothy.)

thing to anybody or do anything to show that plane was yours? A. Why, no.

Q. Mr. Dorothy, did you say that you took that plane over to Pacific Northern's hangar and had it gone over by mechanics?

A. They checked it over, yes—looked at the fabric and the airplane's general condition and the finish. We listened to the engine, checked the magnetos, pulled the——

Q. Do you know what value was put on that plane at that time by the mechanics?

Mr. Cuddy: Object, if the Court please.

Mr. Kay: He can state his own opinion.

Mr. Davis: I will ask his opinion.

The Court: He may state his own opinion.

Mr. Davis: What was the value, in your opinion, on September 3, 1947?

A. Your Honor, may I state what opinion we as a group came to?

The Court: I think you can state your own reasons and then state the reasoning by which you arrive at that opinion, but [95] your own opinion is what you may testify to. You may arrive at that opinion through a variety of sources of information or circumstances.

The Witness: Well, on the basis of its—well, how would you say it—of its value in the States, or its replaceable value—its market value, plus the cost of getting it to Alaska—my conclusion it was worth—

Mr. Cuddy: Wait a moment. Didn't we rule on

(Testimony of Don Dorothy.)

it before he had to state the value of the plane in the area where located?

The Court: He is arriving at it.

The Witness: I am arriving at it now. \$5500.

Mr. Davis: Now, will you go farther and tell the Court and jury how you arrived at that being the value of that particular plane?

A. Well, by its replaceable cost—the cost of replacing it—on the basis of advertisements in the trade journals, planes for sale.

Q. Is that based on the value of a similar plane in the area here in Anchorage, Alaska?

A. No, all the trade journals are published Outside, so to that you have to add the cost of getting the airplane up here.

Q. Now, when you talk about \$5500 as being the value of this plane on September 6, is that the value of a similar plane to this one in Anchorage, Alaska—that \$5500?

A. That is right.

Q. In the area here?

A. That is right.

Q. Mr. Dorothy, is there anything that I have overlooked that the Court and jury should know about this case that you should tell them?

Mr. Kay: Your Honor, that seems to me to be a search-all question which is clearly objectionable.

The Court: Well, he may suggest some subject that has not been testified to. You may answer. [96]

The Witness: Well, at the moment I don't think think of anything.

Mr. Davis: Excuse me one minute, your Honor. (Conferring with Mr. Manders.) Your witness.

(Testimony of Don Dorothy.)

Cross-Examination

By Mr. Kay:

Q. Mr. Dorothy, I think you testified that for approximately two or three years before the time of this accident you had been flying the inlet run for Pacific Northern Airlines? A. That's correct.

Q. And in that flying I believe you testified that you have been using a Travelaire?

A. That is correct.

Q. Would you describe that Travelaire plane to the jury, Don?

A. Yes, it is the same general type as this Stinson. They are referred to as high-wing monoplanes and the pilot sits up forward on the left hand side and the passenger may sit beside him. And in the case of the Travelaire there's two rows of two seats each behind the pilot—makes the total of a six-place airplane. And then there's a large baggage compartment and mail space behind that; and the cabin is entered from the rear.

Q. What, if you know, Don, is the cruising speed of that Travelaire?

A. It is about a hundred and five.

Q. 105 miles an hour? And at what speed does the Travelaire land, Don? A. Oh, about 60.

Q. Lands as fast as 60 miles an hour?

A. Yes, if there is anything in it. Of course, if it's empty it will land slower.

Q. How slow would it land if it were empty?

A. With no wind? About 50.

Q. And describe the tires on the Travelaire, will you, Don?

(Testimony of Don Dorothy.)

A. They are large doughnut balloons—just the size I don't know, but they are about that big around. (Demonstrating.)

Q. How wide are they, would you say?

A. 12 or 14 inches.

Q. What type of brake does the Travelaire have on it, do [97] you know?

A. It has got an internal tubular expanding Goodyear brake.

Q. An internal expanding Goodyear brake?

A. Yes, there is a tube in there about six inches in diameter and about a foot long in the hub that expands against the hub, actuates it.

Q. How is that brake operated by the pilot?

A. With the toe brake.

Q. Pressure of the toe you operate the brake?

A. Yes.

Q. Is there an independent brake for each wheel?

A. That is right.

Q. And you operate the brake by pressure of the toe of the respective foot? A. That is right.

Q. Now, turning to the Stinson airplane, Don, how fast does this airplane which you were flying on September 6—how fast does that cruise?

A. Cruise?

Q. Uh-huh?

A. Oh, if you worked at the altitude I flew, at about 2,000 feet, and with a reasonable amount of power, it moves about 120. If you worked more power it would cruise 140 or so. In higher altitude—what

(Testimony of Don Dorothy.)

is known as optimum altitude—it might cruise faster than that.

Q. How fast does that plane land?

A. Well, it lands at about 60 also because it is equipped with flaps.

Q. Don, isn't it a matter of fact that that plane lands at about 70 to 75 miles per hour?

A. No, not unless you made a wheel landing—you know, landed on just the two front wheels and let the tail settle—but with flaps it will land just about 60.

Q. Isn't it a matter of fact that if you landed that plane at as slow a speed as 60 miles an hour you would be in danger of a crash by reason of the low speed—stall out? A. Why, no.

Q. In other words, it is your testimony that it lands at about 60 miles an hour?

A. That's when the wing, with the flaps [98] down, ceases to become effective enough to hold the airplane off the ground.

Q. Now, what size of a tire does that plane have on it, Don?

A. It has got a Maller tire. I don't know the size of it, either, but it is about—oh—seven inches in diameter.

Q. It is about half the size, then, of the Travelaire type? A. That's about right.

Q. And how does—what kind of brake, if you know, does the Stinson have on it, Don?

A. It has a Goodyear disk brake—hydraulic—hydraulically operated.

Q. A Goodyear hydraulic disk brake?

(Testimony of Don Dorothy.)

A. Pardon me, Goodrich.

Q. Hydraulic disk brake?

A. I am not too positive it's Goodrich made it, but I am reasonably sure it is a Goodrich disk brake. I know it is hydraulically operated.

Q. How does that brake operate by the pilot?

A. On that airplane it has large pedals down there just the shape of your feet and you operate the brakes on it with your heels.

Q. In other words, the brakes on this airplane operate just the opposite of the brakes on the Travelaire?

A. That is correct.

Q. The Travelaire has a toe brake, operated by your toe; the Stinson has a heel brake operated by your heel?

A. That's right.

Q. And how long had you flown the Travelaire previous to this accident?

A. Three years. This particular Travelaire was in service a little over two years, but we had another one just like it before that.

Q. Now, how often had you flown this particular Stinson, Don, at the time of the accident?

A. How often?

Q. How many takeoffs and landings had you made?

A. I made one—well, I don't know on that Thursday whether I made one or two, but I believe only one. That would be one landing and takeoff. Well, we'll just count the landings. It's a cinch if there was a landing there must have been a takeoff.

Q. Right.

A. All right. There was one Thursday and there

(Testimony of Don Dorothy.)

[99] was one at Kenai on the field and there was one on the beach, and there was one back to Kenai and then there was one back at the beach.

Q. In other words, the accident occurred on the fifth landing? A. On the fifth.

Q. Now, Don, did you have any difficulty in adjusting yourself to the fact that you had been flying a plane with a toe brake for the three years and now you were flying one with a heel brake?

A. No, you are never conscious, hardly, of whether you have heel or toe brakes, because it is just like an airplane with a stick or a wheel. If you can fly you can operate either type.

Q. Now, on the Stinson, if you used your toe you steered the plane with a rudder, didn't you?

A. Well, yes, but if you tried to apply the brake with your toe you would get nothing, so you would immediately change over and use your heel.

Q. So, when you pushed with your toe in the Stinson you would steer the airplane using the rudder?

A. No, you would not, for this reason: That when you push with your toe in the Stinson, you wouldn't get anything because you are holding the right pedal from going down because the other pedal would want to come up and your other foot is on it. That's the reason you can't confuse the rudder with the brakes. But now, in the case of the brakes, both pedals can go down at once, or one can go down at a time, but in the case of the rudder if one goes forward the other rudder has got to come back.

(Testimony of Don Dorothy.)

Q. In other words, if you pushed on the left the right foot would come back?

A. Yes, if you let it. But you wouldn't let it if you are working for a brake action.

Q. Yes, but when coming in with a landing you are guiding it with a rudder? A. That is right.

Q. You are guiding it for a landing using the rudder? A. Yes.

Q. So, in guiding this Stinson you would be guiding the plane with your toe, with the rudder?

A. That's right.

Q. Now, as you come in for a landing it is necessary to guide the plane rather carefully, isn't it, and continually? A. That's right.

Q. So that when you came in for this landing on the beach down there your toes were working pretty fast, you might say, on that rudder?

A. Uh-huh.

Q. Now, isn't the logical method of steering an airplane, Don, by means of the rudder?

A. That is right, but when you are landing you are continually decelerating, in other words slowing down, and then there comes a time when the rudder is no longer effective—it takes air speed to make it effective—and then you change over to your brakes and forget about the rudder from there on in.

Q. Now, at 60 miles an hour you were traveling a mile a minute, correct? A. That's right.

Q. You were traveling, in other words, 5,280 feet a minute? A. Right.

Q. And you testified that you applied the brake, I believe, at about a hundred feet after you touched

(Testimony of Don Dorothy.)

the beach, is that right?

A. I would say that is correct, yes. I was holding it with the rudder.

Q. On direct testimony you stated you applied the brake at about a hundred feet, right?

A. Yes.

Q. In other words, you had been on the beach about $11\frac{1}{4}$ second at the time you applied the brakes, correct?

A. That would be about correct, yes.

Q. Now, in that $11\frac{1}{4}$ second you were torquing it to—[101] holding with the rudder—steering the plane, were you not?

A. Yes, and also a little outside aileron, too.

Q. And if the plane started to drift up the beach, as you testified that it did, wouldn't it be logical to steer with the right rudder—steer it back down—hold it in a straight line down the beach?

A. Yes, but you must remember a Stinson or any other airplane with flaps in the top wing—and in this case the Stinson only has a top wing—the flaps do quite an effective job of braking without the rudder and it is very ineffective after you are once on the ground with the flaps down. For that reason, as soon as we are three points on the ground it is always good policy to put your flaps back up because it makes the tail heavier and causes the tail to stay down better. Which I did—I had already dumped the flaps before I used the brakes.

Q. Now, during this $11\frac{1}{4}$ second when the plane started to drift up the beach, you bore down with your heel, did you not?

(Testimony of Don Dorothy.)

A. Let me correct you on that: The plane never started to drift.

Q. Started to turn?

A. No, it never started to turn. I was applying the brake to keep it straight.

Q. In other words, you were anticipating, as a good pilot would, is that it? A. That is right.

Q. So you pressed down with your heels?

A. I kept a little right brake on, sure.

Q. You pressed down with your heel?

A. That is right.

Q. Now, isn't it a matter of fact, Don, when you pressed down with your heel you anticipated you would be steering that plane with the rudder?

A. Why, no.

Q. Isn't it a matter of fact, Don, you had been flying this Travelaire so long that when you bore down with your heel, as you would in the Travelaire, you thought you would be steering the plane with the rudder?

A. No, I knew definitely I would be applying the brake. [102]

Q. And isn't it a matter of fact that with the narrow tires it would be an extremely inadvisable thing for you to do to jam on the brake 100 feet—only 1¼ second after touching the beach?

A. I never jammed on the brakes.

Q. You just testified you applied pressure sufficient to cause the tire to dig into the beach—you testified there was a mound of gravel, isn't that correct?

A. Yes, the mound of gravel was made by the wheel digging into the gravel.

(Testimony of Don Dorothy.)

Q. Digging into the gravel, right?

The Court: Well, let the witness answer.

Mr. Kay: And that was because of this heel pressure that you had applied in the plane?

A. No, it was because the brake never did release—the pressure built up.

Q. Now, Don, about that point: Have you examined the right wheel on that Stinson since the time of the accident?

A. I looked at it day before yesterday.

Q. Did you remove that wheel from the plane?

A. No, I didn't, of course not, but the salvage crew had to disconnect the brake line, the pipe that goes to the wheel, to get the brake to release after they turned it over.

Q. Did you examine that? Of your own knowledge, do you know that? A. Yes, sure.

Q. You were there when the salvage crew did that?

A. No, they told me they did that.

Q. They told you. but you don't know of your own knowledge?

A. And I went and inspected the plane and pipe line and it is still disconnected.

Q. Has the wheel ever been removed that you know of? A. That I couldn't say.

Q. As a matter of fact, it is sitting out there with the cotter pins still in it, behind the Pacific Northern hangar, isn't it?

A. I don't know about the cotter pin, but it is sitting [103] behind the hangar.

Q. With the wheels still on the plane?

A. With the wheel still on the plane.

(Testimony of Don Dorothy.)

Q. Now, wouldn't it be logical, if you were going to contend that brake locked, to remove the wheel and——

Mr. Davis: Your Honor, I have let this go on a long while, but he is now asking for a conclusion of the witness—he stopped me awhile ago. It is entirely immaterial and incompetent and I think it should be stopped at this time.

The Court: It is a matter of argument. Objection is sustained.

Mr. Kay: But you never have removed the wheel from the plane? A. No, that isn't my job.

Q. Now, turning to the afternoon of September 3, Don, you stated that you went out to the trailer court and introduced yourself to Mr. McCandless, I believe. A. That's right.

Q. And that he was working on his car?

A. That's right.

Q. Now, where was his car situated, if you can recall, with regard to the nearest trailer?

A. Well, there is a U-shaped road runs through the place—quite a wide road—and he was parked in this—to the side of this road—I think 30 or 40 feet from the trailer where he lived.

Q. It is your testimony that his car was 30 or 40 feet from the nearest trailer?

A. That is to the best of my recollection, yes.

Q. Now, isn't it a fact that there is a trailer parking space beside each trailer at that trailer court, approximately, the parking space about eight feet from the trailer, Don?

A. Well, I think most people park beside their

(Testimony of Don Dorothy.)

trailer—between theirs and the next one—but that isn't where his was that time.

Q. It isn't a fact his car was in parking space about eight feet from the trailer?

A. No, it was out in front of the [104] trailer—I mean the end that you pull.

Q. Now, I believe you testified that the first matter that you brought up with Mr. McCandless was the question of chartering the plane or hiring the plane?

A. That is right.

Q. Isn't it a matter of fact, Don, that you first discussed with him the question of purchasing the plane?

A. No, I talked about renting first. That was my instructions and that's what I was interested in, was chartering an airplane.

Q. Did you introduce yourself to Mr. McCandless as the chief pilot for Pacific Northern Airlines?

A. No, I did not. I said I was a pilot.

Q. A pilot for Pacific Northern?

A. Yes. It was the chief pilot that sent me to see him.

Q. And you, I believe, testified that you suggested to him a charter or hire contract at \$35.00 per hour?

A. Uh-huh.

Q. Gas, oil, maintenance and liability insurance, is that correct?

A. Uh-huh.

Q. That states it?

A. Yes; the liability insurance applies to the passengers and the freight and the mail, and if the airplane goes down some place this insurance pays for getting them out.

(Testimony of Don Dorothy.)

Q. Now, you stated that, at one point in your testimony there, that you would get in touch with your Seattle office. What was that in regard to?

A. That was in regard to buying the airplane. Our staff here would look it over and make a recommendation that the Seattle office buy it at a certain price.

Q. And didn't that also apply, as a matter of fact, to the provision for chartering the airplane?

A. No, we had the authority to charter an airplane right here.

Q. Well now, did you discuss the fact with Mr. McCandless that Mr. Woodley might be in town that week end.

A. I never mentioned Mr. Woodley's name.

Q. You never mentioned it at all during that conversation? [105]

A. Not at all.

Q. Didn't refer to the fact that he would be in town that week end?

A. No, I didn't say he was coming in. I don't think he has been up here since the accident.

Q. He, as a matter of fact, did not come in town that week end, is that right?

A. As far as I know he did not, no.

Q. You don't know whether he did?

A. No, I don't know for sure, but I think if he had been here I would have known it.

Q. I believe you testified that you are employed by the Army now, Don?

A. That is right.

Q. Approximately how long have you been employed by the Army?

A. Since the fourth of February.

(Testimony of Don Dorothy.)

Q. When did you terminate your work with Pacific Northern Airlines?

A. September 15 last year.

Q. Now, after the accident, how long did you remain at the scene of the accident, Don?

A. Oh, I think about 30 minutes.

Q. And then you took a dory or boat over to across the river?

A. Yes. There was—these men that were there that I was to pick up were Libby-McNeil and Libby officials—one of them the cannery superintendent. I conferring with them there on the beach a while about how we could get the airplane back on its feet and get it up high and dry, and we had quite a consultation about it and decided it couldn't be done before the tide came in and did its damage because all gear and equipment and everything was all greased up and put away for the winter. There was no trucks or tractors available or anything: That is, that you could get on the spot before the tide came in.

Q. Where was the tide at that time?

A. The tide was out at the time of the accident, which was about 10:30 or something like that in the morning, but it was due in in the afternoon about two.

Q. Now Don, do you recall who your passengers were on the [106] first trip that you made off the beach there?

A. There was—it was a man and a lady going to Homer. They are residents down there, but I don't remember their names.

(Testimony of Don Dorothy.)

Q. Would their names be Sam Bell and Frances Pabeloff, do you recall?

A. Oh, let me see—I know Sam Bell; I believe it was.

Q. It was Sam Bell and it might have been Frances Pabeloff?

A. Yes, it was a lady.

Q. Now, did you have any discussion with them during the flight there—conversation at all?

A. Oh, if I did I don't recall what it was.

Q. Did you have any conversation after you landed?

A. At Kenai? I might have made a mention that the Kenai field was softer for these small wheels than the beach was, I believe——

Q. Are you sure that was the Kenai field you were talking about, Don?

A. Yes, I made this mental note the first time I landed there, and when I came in the second time with this Bell and whoever the lady was I made another mental note and I might have said out loud to them that the Kenai field was worse than the beach.

Q. Now, as a matter of fact, Don, weren't you talking about the beach? Didn't you tell Sam Bell and Frances Pabeloff that the beach was tricky and that you didn't like it?

A. No.

Q. You didn't make that remark?

A. If I did, I don't remember it.

Q. You don't recall whether you made that remark or not?

A. That is right.

Q. You might have made it?

A. Well, no, I would be sure that I haven't—that

(Testimony of Don Dorothy.)

I didn't say it—because if I would have said it I think I would have remembered it.

Q. Now, Don, referring to the brake on the plane again: Would the brake lock or grab, as you described it? Would it be [107] fair to say that the brake seized? Is that the technical word for it?

A. Well, that would practically require the use of a dictionary to figure out just what these terms mean—locked and seized.

Q. Have you ever heard the term “seized” used to apply to brakes? A. Yes.

The Court: What did you say, no?

The Witness: Yes.

The Court: Oh, you said yes?

Mr. Kay: And would a seized brake show signs of over-heating? A. I believe it would, yes.

Q. And in other words, if the brake seized on this plane it would show signs of over-heating, is that your testimony?

A. Well, you are asking me for an opinion?

Q. That is right, you are an expert.

A. In the first place, I don't think the brake seized for this reason: That five days later when the airplane was turned over it could not be moved—that is, with the wheels rotating—until they disconnected the brake pipe that carries the fluid under pressure to the wheel, and when they took that off that allowed the pressure to run out, so the trouble was in the piston—in the brake cylinder.

Q. Well, if the trouble was in the piston, then, assuming that there was any trouble, that it stopped

(Testimony of Don Dorothy.)

the wheel, wouldn't the disk show signs of over heating? A. Not necessarily.

Q. Not necessarily?

A. They wouldn't over heat in a hundred feet or so.

The Court: Court will stand in recess until 10:45.

(Whereupon recess was had at 10:35 o'clock a.m.)

After Recess

The Court: Without objection the record will show all members of the jury present.

And counsel may proceed with examination.

Mr. Kay: Thank you, your Honor. Just a few more questions, Don: You testified in your opinion this aircraft was of a value [108] on September 6 of about \$5,500?

A. That would be my estimate of its replaceable value.

Q. Do you recall what your estimate of its value was at the time you filed your answer in this action?

A. I believe I said less than \$6,000.

Q. You said less than \$6,000 in your answer?

A. Uh-huh; that's just a general answer.

Q. Now, in arriving at that figure, Don, you keep yourself informed on the prices of airplanes generally? A. I do, in trade journals, yes.

Q. You do consult the trade journals? Do you read Trade-A-Plane? A. Yes.

Q. Do you recall any Stinson SR9F of a similar type being priced in Trade-A-Plane?

(Testimony of Don Dorothy.)

A. Yes, I saw one the other day.

Q. Did you see any priced in the Trade-A-Planes during 1947?

A. I don't recall whether I saw a SR9F during '47 or not. This one that I saw was—I think was in a December issue of '47, though.

Q. Just to refresh your recollection, Don, I will ask you if you read that particular Trade-A-Plane item marked there. (Handed paper to the witness.)

A. No, I never saw this one. It's apparently a similar aircraft, though.

Q. Very similar aircraft, and what was the price stated in Trade-A-Plane?

A. You mean—that isn't Trade-A-Plane, is it?

Q. I believe that is Trade-A-Plane.

A. Yes, I guess it is. 9,500 that says.

Q. And that is a similar type of airplane?

A. Yes, but you must remember this: There are a lot of people own airplanes that just think they want to sell them. They put some fantastic price on them.

Q. But that is the price stated in that?

A. In that particular Trade-A-Plane, yes. [109]

Mr. Manders: Let me see that, please?

Mr. Kay: Certainly. (Handed paper to Mr. Manders.) Now, just to refresh your recollection—

Mr. Davis: Just one minute. (Examining paper with Mr. Manders.)

Mr. Kay: I hadn't planned to use that in evidence, but if you would like to have me I would be glad to identify it.

Mr. Davis: You might ask him the date on that.

(Testimony of Don Dorothy.)

Mr. Kay: Certainly. The date on this particular Trade-A-Plane, Don, will you state that?

A. That is the second issue of February, 1947. There has been a terrific drop since then.

Mr. Manders: Mr. Kay, is the entire paper there.

Mr. Kay: I don't know, Mr. Manders. It appears to be a sheet.

Mr. Manders: Let me see it. (Mr. Kay handed to him.)

The Court: Counsel may proceed.

Mr. Kay: I was going to ask that that be marked as Plaintiff's Exhibit 1 for identification.

The Court: It may be so marked.

(Plaintiff's Exhibit No. 1 marked for identification.)

Mr. Kay: I will ask you if Trade-A-Plane is a commonly used journal of prices trading in airplanes?

A. It is the largest and, I believe, the most common and authentic.

Q. And does this sheet appear to be a sheet of the second issue of February, 1947, Trade-A-Plane?

A. It does. At that time they were using white paper. They are back to yellow now.

Q. Now, I ask that Plaintiff's Exhibit I for identification be introduced in evidence as Plaintiff's Exhibit 1.

The Court: It may be shown to counsel for defendant.

(Testimony of Don Dorothy.)

(Mr. Kay again handed paper to Mr. Manders.)

Mr. Manders: This ground, your Honor: That it go in for the purpose of showing an offering price only.

The Court: Well, is there objection? [110]

Mr. Manders: There is objection to it excepting that it go in for that one purpose. It isn't the sale price of airplanes,——

Mr. Kay: All we are offering it for——

Mr. Manders: Just a moment—for the reasonable value. This is a trade journal of offerings.

Mr. Kay: That is right.

The Court: If there is no objection it may be admitted for a limited purpose.

Mr. Manders: All right.

The Court: As Plaintiff's Exhibit No. 1.

(Plaintiff's Exhibit No. 1 admitted in evidence.)

Mr. Kay: It is admitted, then, your Honor?

The Court: Yes, to show the offering prices only.

Mr. Cuddy: Your Honor, very technically I believe an exhibit must be read to the jury. Will counsel stipulate that only that one particular ad referring to the Stinson need be read?

Mr. Davis: We will waive reading even that one ad.

Mr. Kay: Well, I would like to read that one ad.

The Court: You may read that one part to which

(Testimony of Don Dorothy.)

you have made reference. The rest of it may be considered without being read, as I understand.

Mr. Kay: Yes, sir. The particular ad in reference in the February issue of Trade-A-Plane:

“For Sale or Trade: SR-9F Stinson, 450 Wasp Jr. Cruises 150, 5 passengers, new cover, 3 band receiver 3105-6210 transmitter, rust brown leather and pleated covert cloth upholstery, flares, relicensed, day, night, and instrument. Will deliver anywhere for expenses. This beautiful high performance ship, \$9500. George D. Mace, Jr., Box 696, Procnix, Arizona.”

Mr. Manders: Just a minute——

The Witness: There's a possible witness.

The Court: What is it? [111]

The Witness: I saw a possible witness.

Mr. Manders: I have a witness here and I didn't want him in the court room.

The Court: All right.

Mr. Kay: And I believe you stated that the description of the plane which I have just read from the Trade-A-Plane is substantially similar to the plane involved in this case?

A. It seems to be, yes.

Q. I will ask to have this marked as Plaintiff's Exhibit 2 for identification (handing paper to clerk).

(Plaintiff's Exhibit 2 marked for identification.)

Mr. Kay: I will show you, Mr. Dorothy, Plain-

(Testimony of Don Dorothy.)

tiff's Exhibit 2 for identification and ask you to state what it is, please?

A. It is the Trade-A-Plane sheet for the third issue of March, 1947.

Q. And show you the item marked in ink there and ask you what that refers to?

A. This is a different model, however. This has a 350 Wright engine instead of a 450 Pratt and Whitney. Want me to read it?

Mr. Kay: Please.

A. (Reading):

"Stinson SR-9 Reliant, seaplane and landplane, 350 Wright factory job, brand new floats, deluxe model, never been in water, ship on wheels now, complete instruments, 2 radios, transmitter, loop, mooring light, beautiful ship. \$8900, will accept trades, can finance. Leeward Aeronautical Co., Airport, Pittsburgh, Pa., or Vandergrift, Airport, Penna."

However, that includes floats at \$8900.

Q. All right (handed paper to Mr. Manders).

Mr. Manders: The same objection, that it be limited for the one purpose, as to the other, your Honor.

The Court: You have no objection otherwise? It may be admitted for the limited purpose of showing offering price only.

(Plaintiff's Exhibit No. 2 admitted in evidence.) [112]

Mr. Kay: In reference to that last plane, Mr.

(Testimony of Don Dorothy.)

Dorothy, would the fact that it only had a 350 HP motor make it of less value than if it had a 450 Pratt and Whitney?

A. Well, it is a matter of choice. However, most people prefer the Pratt and Whitney engine to the Wright.

Q. Isn't the value more—the price, market value, more?

A. With the Pratt and Whitney in it?

Q. Yes.

A. They cost more originally new, but they are not necessarily worth any more in a used condition because they are more expensive to operate and lots of people don't want them—the Pratt and Whitney—for that reason.

Mr. Kay: That is all.

The Court: Is there any redirect examination?

Redirect Examination

By Mr. Manders:

Q. Mr. Dorothy, during the time that you were flying for Pacific Northern on the Anchorage-Kenai-Homer run, how frequently did you have occasion to, or did you, land on the beach by the cannery across from Kenai?

A. Oh, I landed there nearly every trip.

Q. And how many trips would you say that you made a week, on that run?

A. Oh, when everything was normal it was three trips a week, but during the rush periods, why, there's sometimes three trips a day.

(Testimony of Don Dorothy.)

Q. And that was during a period of approximately three years?

A. It was more than three years.

Q. Now, did you leave the Pacific Northern of your own account? A. I did.

Q. And who were you employed by then?

A. I went to work for Alaska Airlines as a pilot.

Q. As a pilot? A. That's right.

Q. And what type of planes did you fly for Alaska Airlines? [113]

A. AT-19's—Stinsons—very similar to this SR9F we are talking about.

Q. And where did you fly that plane?

A. On the same route.

Q. The same route? Did you have occasion to land that plane—a Stinson—on this same beach?

A. Yes, I landed on that same beach a couple of times with their Stinsons and many other beaches.

Q. Now, you have testified to this occurrence where this airplane was damaged. Have you ever damaged any other airplane?

A. No reportable damage. Damage up to a certain point is not reportable, but several years ago——

Mr. Cuddy: Oh, we object, if the Court please; immaterial—no part of the issues.

Mr. Manders: It certainly is material. They have alleged that he negligently did so——

Mr. Kay: Oh, where is that allegation?

(Testimony of Don Dorothy.)

The Court: If he had damaged other planes I think it would not be admissible evidence here. Therefore, the objection must be sustained. If he didn't have any other reportable damage——

Mr. Manders: Very well. This offer that you saw in the Trade-A-Plane just a moment ago—Exhibit No. 2 for identification—that refers to floats together with that?

A. That's the way it reads.

Q. Is that correct?

A. That's the way it reads, yes.

Q. Do you know the market value of floats together with such a plane?

A. I could only estimate their value. Floats for a plane of that type would cost about \$3500.

Q. \$3500? A. Roughly.

Q. There is a different finish—interior finish—to various planes, is that correct—upholstery and all?

A. That is right. Manufacturer uses different materials.

Q. Would you say, from that ad in the first exhibit which [114] you read, that the reconversion of that plane, whether it was reconverted or whether it was new, was comparable to the plane here in question?

A. May I see that Exhibit 1, please? (Clerk handed paper to witness.) Thank you. Well, it seems that this—it seems that this SR9F mentioned in here has quite a de luxe upholstery job in it—rust brown leather, pleated covert cloth up-

(Testimony of Don Dorothy.)

holstery. That rust brown leather runs into money.

Q. Was that present in the plane that's in——

The Court: I am not able to hear you, counsellor.

Mr. Manders: Was that present in the plane in this case—leather?

A. No, I think it had leatherette in it if I am not mistaken—if I remember correctly.

Q. From that ad and in this plane that is in the instant case, would you say that they are the same?

A. Well, that's awfully hard to say, just reading the ad. If I could see the two airplanes I could tell you exactly, but these ads are very misleading sometimes.

Q. It was not unholstered in leather?

A. Which one?

Q. This one here—the instant plane—Mr. McCandless's? A. Yes——

Mr. Cuddy: Wait a minute: The witness hasn't testified it was upholstered.

Mr. Kay: It is a pretty leading question, your Honor.

Mr. Manders: Will you tell me, Mr. Dorothy, how the plane owned by Mr. McCandless was upholstered?

A. Well, I don't believe I can remember. I think it had red leatherette in it, if I remember rightly.

Mr. Manders: That is all.

(Testimony of Don Dorothy.)

The Court: Is there any further cross-examination?

Mr. Cuddy: That is all, sir.

The Court: That is all. Have the jurors any questions? That is all, Mr. Dorothy. You may step down. Another witness may be called. [115]

RAYMOND I. PETERSEN,

being first duly sworn, testified for and in behalf of the defendant as follows:

Direct Examination

By Mr. Manders:

Q. Mr. Petersen, will you state your name to the jury? A. Raymond I. Petersen.

Q. You are a resident of Anchorage?

A. Yes, sir.

Q. For how many years?

A. Well, I moved to Anchorage in 1934 and I have been away part of the time, but most of the time I have lived here.

Q. What business are you engaged in, Mr. Petersen? A. An airplane operator.

Q. How long have you been engaged in that business?

A. Well, I have been engaged in the direct business for about 13 years.

Q. Do you operate airplanes yourself, as a pilot?

A. Yes, sir.

Q. Do you hold a pilot's license?

A. Yes, sir.

Q. To operate what type of planes?

(Testimony of Raymond I. Petersen.)

A. Well, anything from single-engine land up to multi-engine aircraft.

Q. How many years have you been operating planes either of single-engine or multi-engine?

A. About 17.

Q. 17 years?

A. Yes, sir—as a pilot.

Q. What types of planes have you operated?

A. Well, I have operated——

Q. That is, the names of the planes?

A. Ryans, Travelairs, Robins—oh, there's a long list—Stinson's, Douglas's, Lockheeds—those are the main ones. I couldn't remember all that I have flown or used.

Q. Have you ever purchased or bought Stinson airplanes?

A. Yes, sir.

Q. Have you sold any Stinson airplanes?

A. Yes, sir.

Q. And in your purchase and sale of those planes—are [116] you familiar with a SR9F plane—Stinson?

A. Yes.

Q. What would you say would be the value of a Stinson SR9F reconditioned airplane at Anchorage, Alaska, in 1947, in the month of September?

Mr. Cuddy: Well, we think there ought to a further description, sir, of the plane if it is for purposes of showing the value of this plane as to equipment and condition—how many hours on it—that's a very general description. The answer would have to be extremely general.

The Court: I think counsel ought to give fur-

(Testimony of Raymond I. Petersen.)

ther description of the plane before asking for the witness's opinion.

Mr. Manders: Take the case of a plane that has a reconditioned motor placed in it, new wings, two-way radio, instruments, and at the time the fuselage was purchased at the figure of \$1700. Now, to re-equip, reconvert that airplane in flying condition, what would be your estimate as to that?

Mr. Cuddy: Well, we object to that yet—for instance, counsel has stated “a reconditioned engine.” An engine might be reconditioned by some ham factory that is not qualified, or it could be reconditioned by the factory, and then it starts out with zero hours; and also it should state the equipment that is on the plane.

The Court: That is right, but I do not know how we are ever going to get everything written down unless counsel can get the description of the plane from the testimony and put in all the conditions.

Mr. Manders: Well, I haven't the complete description of that plane, your Honor.

The Court: Do you think you have given it so far?

Mr. Manders: Mr. Petersen, do you happen to know of a plane owned by Mr. McCandless?

A. Well, I am not familiar with who owns the aircraft. I did inspect the aircraft that I believe is in question here—18411, I believe it is—parked out beside [117] PNA's hangar.

Q. You mean at this time?

A. Yes.

(Testimony of Raymond I. Petersen.)

Q. Well, did you ever see that plane before?

A. Not that I know of. I tried to place the airplane today, and if it is the one I am thinking of it is the one that was purchased from the CAA—or the CAA had here—it was War Assets offering, and I had discussed that with my partner today and asked him if he knew anything about it——

Mr. Cuddy: We object to what some partner may have said to Mr. Petersen. That is hearsay.

The Court: You cannot repeat——

Mr. Manders: You can't testify to what your partner said, but you have no other knowledge of that plane? A. None whatsoever.

Q. As to the exact plane we are talking about, in a damaged condition? A. That is right.

Q. You have never seen it before?

A. If I did I don't remember it.

Q. Mr. Petersen, with the information that I have given you as to the reconditioning properties of this plane, and a factory reconditioned motor—450 Wasp engine, Pratt and Whitney—what would be the value of that plane?

Mr. Cuddy: We object for the previous reasons given, sir: It is not a complete question as to the condition of the plane.

The Court: I think I shall permit it to be answered. Counsel may cross-examine. If you care to give an opinion upon the description so far given you by counsel you may do so.

The Witness: Well, setting the value—or attempting to set the value on an aircraft in 1948,

(Testimony of Raymond I. Petersen.)

regardless of its condition, is fairly hard. They have depreciated to a very low price. I seriously doubt if—regardless of the condition of an airplane of that type, if here in the Territory you could get over—oh, possibly, \$5000 for it and then you would have to—you would have to find a buyer. The aircraft market is bad—it is low— [118] it has depreciated a lot. We—we have the experience of aircraft that we are forced to operate; and if we couldn't use the airplane, we have to rebuild them and put them in good condition. We put a lot of money in them, but if we had to sell them at a forced sale, or any sale, why, we would have the problem of getting a market for that airplane because a man could go out and buy a brand new plane of very much the same type for under \$10,000. So it is pretty hard to set a market value on it with an airplane 10 years of age don't sell for a very high price.

Mr. Manders: When you say "10 years of age," what year would you say that plane was manufactured? A. 1937, I believe the SR9 was built.

Q. Did you, in your business of operating an airplane, ever own a SR9 Stinson airplane?

A. We operated two SR9's. They weren't F models. Ours were C's, with a Lycoming engine.

Q. What are the main differences between those two types of airplanes?

A. Well, it's the engine.

Q. Just the engine?

A. Yes. The letter, as a rule, following the

(Testimony of Raymond I. Petersen.)

model number designates the type of engine installed in that aircraft. I believe the "F" was the Wasp engine, and the "E's" were Wrights and the "C's" were Lycomings. I believe "C's" and "J's" were also Lycomings of different horsepower.

Q. Did you have any occasion to ascertain the market price of a SR9F Stinson airplane—not new?

A. No, not that particular aircraft. I attempted to get some figures through trade sources pertaining to values for this case, and the best I could run into was a SR10, which was a year later model—Tulsa, Oklahoma, for \$4000.

Q. Is that a superior or inferior plane to the SR9?

A. Well, that is a matter of opinion, but we sold all of our SR9's two or three years ago and replaced them with 10's and the [119] subsequent SR77's and AT 19's.

Q. Mr. Petersen, have you a December issue of 1947 of the Trade-A-Plane journal?

A. Well, I believe that's the issue that I took that out of. I left it at my office. I am pretty sure it was December 2, but I wouldn't want to make a positive statement on that.

Mr. Manders: If the Court please, we would like to have that issue here and ask Mr. Petersen if he will arrange to have his office bring it here?

The Court: Very well, it may be produced.

The Witness: I am sorry I didn't bring that.

The Court: Maybe you can send for it.

The Witness: Yes.

(Testimony of Raymond I. Petersen.)

The Court: Consult with the bailiff and tell him what you want.

Mr. Davis: Is it down at the Airways Office?

The Witness: Yes, call 88.

Mr. Davis: Who shall I ask?

The Witness: Anyone in the office. Just tell them I would like to have that Trade-A-Plane laying on my desk brought up here.

Mr. Manders: That is all for the present.

The Court: Counsel for plaintiff may cross-examine.

Cross-Examination

By Mr. Kay:

Q. Mr. Petersen, what would be the approximate horsepower with the Lycoming motor in the SR9F, do you know?

A. Well, the SR9F has a Wasp; the C, the Lycoming. We—the C would be 260 and the J, which, as a rule, they convert to put the 300 Lycoming in—designated the J—would run 250 to 300 horsepower.

Q. Would a plane having a Pratt and Whitney factory 450 HP motor be more valuable than one having a 260 or 300 HP Lycoming in similar condition? A. Well, that—

Q. As far as market value goes?

A. That again is a matter of opinion. We have discussed using the Wasp Jr. Stinsons and [120] turned them down due to the fact they aren't as good a small field airplane as the Lycomings, so it depends entirely upon what the use of the airplane

(Testimony of Raymond I. Petersen.)

is. To some people, why, there's no doubt that the airplane would be of a greater value, but to ourselves it wouldn't. It's definitely a lower value.

Q. Now, I believe, Mr. Petersen—correct me if I am wrong—that on your direct examination by Mr. Manders you estimated, in response to his question in which he laid the description of the plane, roughly that such a plane in 1948 would be worth approximately \$5000?

A. Well, that was a—is understandably a wild guess because it is a question of the buyer getting together with the seller and depending entirely on how bad the seller wants to sell and the buyer wants to buy.

Q. Certainly. It is just your opinion—your opinion as an expert?

A. Well, I based that—I based that on the—on this SR 10 advertised in Tulsa plus a thousand dollars to get it up here.

Q. I see.

A. Now, that was the only basis on which I could make a statement.

Q. What I was driving at, Ray: Did you mean 1948 when you said that, or did you mean 1947?

A. Well, December, of course would be 1947, but I doubt if the one month or the two months involved make a lot of difference.

Q. You were speaking more or less as of the present time?

A. That is right.

Q. Well, now, it is true there has been some

(Testimony of Raymond I. Petersen.)

depreciation all through 1947 in the market value of aircraft here, hasn't there?

A. The market value of aircraft has really taken a nose dive.

Q. Well, now, Ray, I am going to ask you a hypothetical question, describing pretty completely this particular type. I have asked Mr. McCandless to write out a description of it for me here so we can get all the facts, and keep in mind—this [121] will be hard to do, I know—we are speaking of the month of September, 1947. We have got to refer to the market value at that time, not the present time. So, bearing those things in mind, let me ask you what your best opinion would be as to value in September, 1947, of a Stinson SR9F plane, Gull wing type, 450 Pratt and Whitney engine at zero hours—that is, complete factory overhaul—rebuilt, a Hamilton constant speed controllable pitch propeller, the ship being completely majored as to air frame and engine—the engine at the factory—having the following equipment: A two-way radio, three band directional loop, full instrument group for blind flights, licensed in full for day and night, three flares: Now, based on that description as of September, 1947, what is your best opinion as to the value of that ship?

A. Well, I just about have to go back to my testimony under Mr. Manders' questioning, and that is that the condition of the aircraft never seems to take—make too much of an impression on a buyer, that is, if he pays what it is actually—he is

(Testimony of Raymond I. Petersen.)

not going to pay what it is actually worth. Anyone that rebuilds an airplane that may have cost them three or four thousand dollars and puts four or five in it is really an optimist if he thinks he is going to get the four or five thousand dollars out of it. I can't see where the market value has changed materially since September—between September and now. The market of that type of aircraft crashed when new, faster and more efficient planes became available, and that was in the early part of 1947. It appears to me that the value of an aircraft in such fine condition—now, if I were selling mine, which I have in first class shape, why, I wouldn't feel that I could sell them for any less than I had in them, but if I was buying them I would probably look at it altogether different. I would scout the market pretty well and I would probably find an airplane in very good condition that someone would sell who needs the money. Just like this fellow in Tulsa: He must need the [122] money to sell the airplane.

Q. Well, would you feel free, Ray, to give us your opinion on that hypothetical question I asked you as of September, '47?

A. Well, I don't see how it would be—how there would be any particular difference between then and now. I can't see that the airplane would bring over \$5000. Now, I may be very wrong there, but I just continually dabble in the market and looking for aircraft we could use. I know that I

(Testimony of Raymond I. Petersen.)

wouldn't be inclined to pay it, if I had a use for that type of aircraft.

Q. So, your best opinion, then, still would be that even in September, 1947, that estimate would be about \$5000?

A. Well, that's right. I couldn't—

Q. Now, when you answered that 5000 before, Ray, did you consider—well, let me ask you this: What is the value, approximately, of a Hamilton constant speed and controllable pitch propeller, if you know?

A. Well, inasmuch as there's thousands of them surplus, and you can buy an aircraft complete with the engine that's in this airplane, complete with that Hamilton standard propeller, for in the neighborhood of anywhere from five to eight hundred dollars, and get all the instruments that you could possibly use in an airplane thrown in from War Assets, why, I couldn't put a very high value on those props. We bought 10 of them from War Assets here sometime ago for \$25.00 apiece and some of them had no time on them since they were completely overhauled, though when you put them in an overhaul shop they can very quickly run up a hundred or \$125 bill on you, so the value of equipment such as that can be bought surplus is not high; but when you put it in an overhaul base the price goes up because you are getting these inflation dollars involved on that thing.

Q. In other words, when you put four or five months time into it the price goes up?

(Testimony of Raymond I. Petersen.)

A. That is right, but the market is still affected. [123]

Q. By the supply?

A. By the low—the low cost of the supplies.

Mr. Kay: I believe that's all.

The Court: Is there any redirect examination?

Redirect Examination

By Mr. Manders:

Q. Well, just let me ask you one question: Mr. Kay stated to you that that plane was without any hours on it—started at zero. Would the same thing apply if it had 60 hours on it, as to value?

A. Well, let's see: I believe if you depreciated the engine at—oh, very high rate of \$4.00 an hour, why, you would get——

Q. Mr. Petersen, I show you the Trade-A-Plane service paper, third December issue, 1947, and you have stated that you took a figure for the fair market value from that paper. Is that the plane you referred to, marked with a red pencil on that sheet of paper?

A. Yes, sir.

Q. And what type of plane is that?

A. The plane listed here is a SR10F.

Q. And will you just read that ad?

A. (Reading):

“Stinson SR-10-F: Commercial job with Wasp 450 hp AN engine. All instruments and extras, VHF radio, 502 total engine hours, 158 since overhaul. \$4000 f.o.b. Southwestern Aero Exchange, 7744 East Apache, Tulsa, Oklahoma.”

Q. Is that plane comparable to the SR9?

(Testimony of Raymond I. Petersen.)

A. Well, it is a later model—year later. There was quite a difference in the design of the two aircraft—windshields and so forth.

Q. The SR10, even as a new plane, would not be of lesser value, would it?

A. Oh, no, I should say not.

Mr. Manders: I would ask that this be marked Defendant's Exhibit 1.

The Court: Is there objection?

Mr. Cuddy: No objection, sir.

The Court: It may be admitted and marked Defendant's Exhibit A. [124]

(Defendant's Exhibit A admitted in evidence.)

Mr. Manders: That's all.

The Court: Is there any further cross-examination?

Mr. Kay: Just a little, your Honor.

Recross-Examination

By Mr. Kay:

Q. Mr. Petersen, is it or is it not a fact that the SR10 is a straight-wing monoplane?

A. The wing is practically the same. They are both Gull wings.

Q. Both Gull wings? A. Uh-huh.

Q. Is there any difference between the gross weight and the pay load that would be carried by a SR9F and a SR10?

A. Yes, the SR10 has a—now, I can't speak for the 10F, again,—but the SR10C has—

(Testimony of Raymond I. Petersen.)

Mr. Cuddy: Well, now, your Honor, we object if he can't speak as to the airplane that is advertised here and under discussion.

The Court: Objection is sustained.

Mr. Kay: I note that this airplane has 502 total engine hours—158 since overhaul. That doesn't indicate to you—or does it—whether or not the overhaul referred to—158 since—was a major overhaul, or not?

A. Well, yes, that would be 158 hours since major overhaul, I would assume.

Q. Would they refer, then, to the 502 total hours—it would start at zero, wouldn't it?

A. Well, it meant the engine was brand new 502 flying hours ago and that 158 hours ago the engine was given a complete major overhaul.

Q. That is what that advertising means to you?

A. That is what would be the general idea.

Mr. Kay: That is all.

The Court: That is all, Mr. Petersen. Another witness may be called. [125]

Mr. Davis: Defendant rests, your Honor.

The Court: Is there any rebuttal evidence?

Mr. Kay: Your Honor, we have just a very brief amount of rebuttal evidence. We have a witness we would like to obtain. I wonder if we could suspend now and start at 1:30.

The Court: Would that be agreeable to the defendants?

Mr. Davis: If possible, I would like to make it two o'clock. If it is a very brief witness we ought to be able to get through anyway.

Mr. Cuddy: I wouldn't say, sir, over a half hour.

Mr. Kay: Or 15 minutes.

The Court: Well, do counsel care to be limited as to arguments?

Mr. Manders: That is all right.

The Court: Will counsel be satisfied with an hour on each side for arguments?

Mr. Davis: We are satisfied.

The Court: There is no compulsion about it.

Mr. Kay: Perfectly satisfactory, your Honor.

The Court: Very well, it will be understood counsel will be limited to an hour a side for argument, and upon Mr. Davis' request the meeting hour will be two o'clock. That ought to give us time to finish.

(The Court then duly admonished the trial jury about discussion of the case, and the trial was continued until two o'clock p.m., and recess was had at 11:43 o'clock a.m.)

Afternoon Session

The Court: Roll of the jurors may be called.

(Jurors in the box all present.)

The Court: Do plaintiffs care to offer any rebuttal testimony?

Mr. Kay: Yes, sir.

Mr. Cuddy: Yes, sir.

The Court: You may call a witness in rebuttal.

Mr. Kay: Call Mr. Ray Petersen. [126]

The Court: Is that the same witness who testified this morning?

Mr. Kay: Yes, your Honor.

RAYMOND I. PETERSEN,

heretofore duly sworn, resumed the stand and testified for and in behalf of the plaintiff as follows:

Direct Examination

By Mr. Kay:

Q. Mr. Petersen, are you the same gentleman who testified this morning? A. Yes, sir.

Q. I believe you testified this morning that you had been flying about 17 years in the Territory of Alaska?

A. Well, no; 14 years in the Territory. I practiced a little before coming up here.

Q. And that you are an airline operator in the Territory at the present time? A. Yes, sir.

Q. Mr. Petersen, in view of the qualifications that Mr. Manders brought out on your direct examination this morning, your experience in flying in the Territory of Alaska, I will ask you whether or not you would consider the plane described this morning—the Stinson SR9F aircraft—with the size tires and wheels that that plane has, and the weight it carries, a safe aircraft for use in beach operations in Southwestern Alaska?

A. Well, I would say that it is not a good airplane for beach operations.

Q. Would you qualify that as to whether you consider that aircraft a safe type of aircraft for use in beach operations in Southwest Alaska?

A. Well, I wouldn't consider it as such, no.

Q. Would you, as an airplane operator in

(Testimony of Raymond I. Petersen.)

Alaska, use an aircraft of that type for beach operations yourself? A. Well, we don't.

Mr. Kay: That's all.

Cross-Examination

By Mr. Manders: [127]

Q. Mr. Petersen, on what do you base your opinion that that aircraft wouldn't be a safe aircraft to land on a beach in Southwestern Alaska—Southeastern?

Mr. Cuddy: Southwestern.

Mr. Manders: Southwestern Alaska?

A. Well, we have always considered it too heavy an airplane for the size of the wheels to use on a beach operation. We always used a different type of aircraft for that use—something with air wheels or at least large semi-air wheels.

Q. Have you, during your years of flying, ever flown a plane of this type and landed it on the beach where this plane was landed?

A. Where this plane was landed?

Q. On that beach? A. No, sir.

Q. Have you ever landed any of your planes on the beaches along Cook Inlet there?

A. No, I never have.

Q. Where have you landed your planes?

A. Well, we operate—the few beach landings we have were along the Bering Sea out of—oh, Goodnews Bay, mainly—Goodnews and Togiak Bay area.

Q. Then, is your opinion based upon your experience in the Bering Sea and Goodnews Bay

(Testimony of Raymond I. Petersen.)

rather than any actual experience in Cook Inlet?

A. Well, yes, I am afraid it is.

Mr. Manders: That's all.

Mr. Kay: That is all.

The Court: That is all, Mr. Petersen.

Mr. Kay: Mr. Petersen, I would like to ask you a few more.

Redirect Examination

By Mr. Kay:

Q. Are the beaches that you mentioned along the Bering Sea of a similar type, if you know, to the beaches in the Southwestern Alaska area?

A. Well, I believe the beaches along the Cook Inlet area are more subject to mud—tide flats—than the beaches along the Bering Sea. There very seldom we have mud flats in that area. [128]

Mr. Kay: That is all.

The Court: That is all, unless the jurors have questions. Another witness may be called.

Mr. Kay: Mr. W. O. Epps, please.

W. O. EPPS,

heretofore duly sworn, resumed the stand and testified for and in behalf of the plaintiff as follows:

Direct Examination

By Mr. Kay:

Q. Mr. Epps, are you the same gentleman who testified here yesterday? A. Yes, sir.

Q. Do you realize you are still under the same oath that you were yesterday when you testified?

A. Yes, sir.

(Testimony of W. O. Epps.)

Q. Now, there was some testimony about the amount of time that you boys at United Airmotive put on this particular plane, Woody: I wish that you would state what that work which you did on this plane would have cost if it had been done for an outside party who had brought that ship into there for repair?

Mr. Davis: Your Honor, that is improper rebuttal. Object to any such testimony.

The Court: Objection is sustained.

Mr. Kay: I will ask you, if you know, Mr. Epps, what the amount of the reasonable value of the time that you boys put in on this plane actually was?

Mr. Davis: Same objection, your Honor.

The Court: Objection is sustained.

Mr. Kay: Now, Mr. Epps, I believe you testified yesterday that you had had experience as a pilot in flying this particular ship? A. Yes, sir.

Q. And have you—I can't recall whether you testified as to the extent of your experience as a pilot? A. I have about 4000 hours.

Q. About 4000 hours? Mr. Epps, I will ask you whether or [129] not in your opinion this particular ship—this Stinson SR9F—considering the size of wheels and tires it had on it, was a safe ship to use in beach operations in Southwestern Alaska?

Mr. Davis: Your Honor, I object to that question. If he wants to limit it to the beach in question, all right. Southwestern Alaska is too vague.

The Court: Objection is sustained.

(Testimony of W. O. Epps.)

Mr. Kay: I will ask you the same question, Mr. Epps, with reference to the beach across the river in front of the cannery at Kenai?

A. Well, most beaches here are about the same. They change with every tide. I wouldn't say that it was a beach airplane.

Mr. Davis: Now, your Honor, I move that the answer be stricken—not responsive to the question. He has attempted to answer the question I objected to.

The Court: The motion is granted. The answer is stricken and the jury instructed to disregard it because it is not an answer to the question asked.

Mr. Kay: Mr. Epps, I am sorry, but could you—would you feel it possible for you to answer this specific question: In other words, would you consider this particular airplane a safe airplane to use in landing on the particular beach in question at Kenai?

A. Well, I have never landed on that beach—that particular spot. I have landed a little farther down on that beach, below Kasilof. So I couldn't answer that question for that particular spot where the airplane was at that time.

Q. When you landed at that beach what type of aircraft were you using?

A. I used a Cub cruiser, and also a trainer.

Q. Are they similar to the aircraft in question?

A. No, it's a light aircraft.

Mr. Cuddy: Your Honor, so as not to conflict with the Court, may we ask this witness if he would

(Testimony of W. O. Epps.)

use a ship of this type for landing on that field or on the beach off Kenai south of the [130] river?

The Court: You may ask it. If it is objected to it will be ruled out because the witness has testified he has never been on that particular beach.

Mr. Cuddy: May we ask for that area?

The Court: Well, the area may embrace 20 miles. I do not know—I do not see it.

Mr. Cuddy: All right, sir.

The Court: That is all. Is there any cross-examination?

Mr. Davis: No cross-examination, your Honor.

The Court: That is all, Mr. Epps. Another witness may be called.

Mr. Kay: Mr. McCandless, please.

CHARLES A. McCANDLESS,

heretofore duly sworn, resumed the stand and further testified in his own behalf as follows:

Direct Examination

By Mr. Kay:

Q. Mr. McCandless, are you the same Charles McCandless who testified yesterday?

A. I am.

Q. Mr. McCandless, there was some testimony here—you heard Mr. Dorothy testify as to the distance, the location of your car from your trailer. Will you tell the jury, please, exactly where your car was parked on the evening when the conversation with Don Dorothy occurred? Could you draw a little diagram of that portion of the trailer court

(Testimony of Charles A. McCandless.)

on the blackboard? Would that make it easier for you to testify?

A. I could, but I would have to give an explanation with it.

Mr. Kay: I will ask permission of the Court to do that.

The Court: The trouble with blackboard drawings, they have been permitted in the past and may be again, but in the event of appeal, it is very difficult, if not impossible, to put a [131] blackboard drawing into a record on appeal. So if any drawings are made I think they ought to be on paper so they will be available to any other court in event of appeal.

The Witness: Well, your Honor, I might state I think I can state very clearly. Why, my car was parked—in a trailer court space is at a premium. The way the court operates, they get \$35.00 a month for space for one car and one trailer. Each renter has the space allotted for his car and trailer to be parked. If you don't get in that particular spot you are blocking someone else from getting their cars in and out. So I will repeat that my car was parked within four feet of the door of my trailer. I also made a statement I was working on my car, and I kept my tools in the trailer. So there would be no earthly sense of my parking 30 or 40 feet away from the trailer and walking back and forth between the trailer and my car, and work on my car on someone else's ground.

(Testimony of Charles A. McCandless.)

Q. Where were you and Mr. Dorothy standing when you started your conversation?

A. When I started my conversation with Mr. Dorothy I had closed the hood of my car and reached inside and turned the key off and stepped back to where he was standing at the left fender of my car, which was about the four feet I said my car was from the trailer, that is, the door of the trailer and the width of the car, which could not have been more than four and a half feet, and we were leaning against the fender. (This was described with gestures.)

Q. Now, Mr. McCandless, you have heard Dorothy testify that you entered into an agreement with him, or that you entered into an agreement with him whereby he could take the plane down to a hangar—the PNA hangar for inspection. I will ask you whether you at any time gave the defendant, Don Dorothy, permission to fly that airplane?

A. I did not. I gave him permission to taxi the airplane from where it was tied down on the line to the PNA hangar. [132]

Q. Approximately how far away is that?

A. Less than a—approximately a city block. I don't know exactly how far it is. He asked for an inspection of the aircraft and that's what I gave him permission to do. I did not give him permission to fly the plane.

Q. Mr. McCandless, I think you testified yesterday that you have been a flier for considerable time.

(Testimony of Charles A. McCandless.)

Will you state approximately how long you have been a flier again?

A. I got my license in '42, but I was flying considerable on a student license ahead of that. In fact, to be exact, I started flying again in '39, but I had previous experience before.

Q. I will ask you whether or not you would have, as owner and pilot of that plane, have used that plane for beach operations in Southwest Alaska?

A. I would not. It was too heavy a ship and had too small tires on it to land on sand beaches.

Mr. Kay: That is all.

The Court: Counsel for defendants may examine.

Cross-Examination

By Mr. Davis:

Q. Mr. McCandless, I understood you to say yesterday you received your license in 1946. I understood you now to say you got your license in 1942.

A. I meant '42, sir. I got my license in my pocket. I could——

Q. I just want to get it correct. Is the date 1946?

A. '46, that is right.

Q. And what kind of license?

A. That is strictly a private license—single-engine landing.

Q. That, then, doesn't give you any authority to hire—or carry passengers for hire?

A. Not for hire, but I can haul all the passengers or freight I can on my personal operation—or according to CAA operations. I can haul all the pas-

(Testimony of Charles A. McCandless.)

sengers I want to and let them pay their shares of the expenses of the plane. [133]

Q. But you do not hold a commercial license?

A. No, I do not.

Q. Your license is the license known as a private license, isn't that correct? A. That is correct.

Q. What other type ships have you flown besides this Stinson, Mr. McCandless?

A. Oh, considerable number—been mostly private aircraft.

Q. What—just name some of them?

A. Cub, Super Cruisers, Aeroncas, the Silvaire, Luscombe Silvaire, the old Luscombe; flown a Beechcraft Bonanza; I have flown Stinsons of other types—L-5's—

Q. Let's go back a little bit: Now, what is the horsepower on a Cub? On a trainer, let's say?

A. That is 65 to 75 horsepower—some trainers have 85.

Q. All right, what is the horsepower on a Silvaire—on the Silvaire that you used to own?

A. 65 to 85.

Q. On the one you used to own, Mr. McCandless? A. That was a 65.

Q. And on the Super Cruiser?

A. That's a hundred horse.

Q. And on an L-5?

A. 145 or 150—I am not sure.

Q. Now, have you flown any other heavy aircraft except the one in question here?

A. Not enough to say I had flown it, no.

(Testimony of Charles A. McCandless.)

Q. Now, you say you had flown a Beechcraft Bonanza. Now, that is a considerably bigger type plane than these others, with the exception of the Stinson? A. Yes, it is.

Q. What is the horsepower on a Beechcraft Bonanza? A. 165.

Q. And that is all metal?

A. That is right—very fast.

Q. Retractable landing gear? A. Yes.

Q. Flaps? A. Yes.

Q. Did you solo that plane? A. Yes.

Q. Where did you fly it?

A. Seattle, Washington.

Q. Just around the airport there?

A. More or less, yes, within the radius of the airport area—three or four miles of the airport.

Q. How many hours did you put on this plane after you got it—this Stinson 9F?

A. Very few. I think the ship had a total of 49 hours and some minutes on it when I bought it, and when the plane was crashed, that is what I had used it—run it up to 69 hours.

Q. Roughly 20 hours? A. That is about all.

Q. Did—Well, now, just a minute: A part of that was this charter trip we talked about yesterday—this M-K trip? A. That is right.

Q. How much time did that trip take?

A. I don't recall exactly.

Q. About?

A. Oh, it was probably eight hours—eight, nine hours—something like that.

(Testimony of Charles A. McCandless.)

Q. The trip to Aniak and back?

A. Round trip, yes.

Q. So you had, then, roughly, nine, ten, 11 hours—something like that—yourself in this ship?

A. That is right. That's all I got to use it.

Q. You bought the plane the 15th of July?

A. That's right.

Q. And you had it, then, until the sixth of September? A. Correct.

Mr. Davis: That's all, Mr. McCandless.

Mr. Kay: That is all.

The Court: That is all, Mr. McCandless, unless the jurors have some questions. Another witness may be called.

Mr. Kay: No further testimony, your Honor.

The Court: Any surrebuttal testimony?

Mr. Davis: May we have a couple minutes, your Honor? Like to call Mr. Dorothy, your Honor.

The Court: Mr. Dorothy may take the witness stand.

DON DOROTHY

heretofore duly sworn, resumed the stand and further testified for and in behalf of the defendants as follows: [135]

Direct Examination

By Mr. Davis:

Q. Mr. Dorothy, in testifying this morning you qualified yourself, told what kind of planes you had flown and how you had flown them, and I believe you testified that you had landed repeatedly on this

(Testimony of Don Dorothy.)

beach in question. Now, I will ask you, Mr. Dorothy, if there was anything about this plane that made it unsafe to land this plane on that particular beach?

A. Not a thing.

Q. Was this a safe place for landing this airplane?

A. I would say that it was. I have been on there with similar aircraft since several times.

Q. Do you know as to whether or not other pilots using similar aircraft land on that beach repeatedly?

A. Yes, Alaska Airlines lands there all the time with Stinsons.

Mr. Davis: I think that's all, Mr. Dorothy.

Cross-Examination

By Mr. Kay:

Q. Mr. Dorothy, I believe you testified on direct that you had landed on that beach for two or three years?

A. That's right.

Q. And I believe you testified that that was using the Travelaire, I believe you said, for Pacific Northern Airlines?

A. That is right.

Q. There is quite a considerable difference between that Travelaire and this Stinson with regard to the size of the wheels. is there not?

A. That is right.

Q. The Travelaire has big air wheels on it?

A. That is right.

Mr. Kay: That is all.

The Court: That is all, Mr. Dorothy. Is there any further surrebuttal?

(Testimony of Don Dorothy.)

Mr. Davis: One minute, please, your Honor. In view of the rebuttal which has been brought up here, your Honor, it may [136] be wise if we get some other testimony on this point besides Mr. Dorothy. We have a call in for some other operators we would like to get in here on this point. I wonder if we might have a few minutes to see if we can't round them up?

The Court: How much time?

Mr. Davis: We can know in 15 minutes as to whether or not we can get them or not. I sent Mr. Dorothy out to phone and he couldn't get them and he didn't want to be away too long.

The Court: Court will stand in recess until 2:45.

(Whereupon recess was had at 2:30 o'clock p.m.)

After Recess:

The Court: Another witness may be called.

Mr. Davis: I would like to call Bill Smith, your Honor.

WILLIAM V. SMITH

being first duly sworn, testified for and in behalf of the defendants as follows:

Direct Examination

By Mr. Davis:

Q. Mr. Smith, will you state your name?

A. William V. Smith.

Q. Where do you live? A. Anchorage.

Q. Now, speak up real loud; it is hard to hear.

(Testimony of William V. Smith.)

A. Anchorage.

Q. How long have you lived in Alaska, Mr. Smith? A. All my life.

Q. What is your business?

A. Pilot—I fly.

Q. What sort of pilot's license do you hold, if any? A. Commercial.

Q. And what type aircraft are you authorized to fly?

A. Well, I have been flying single-engine airplanes for the last five years—all types, land and sea—or the last six years.

Q. And have you flown a Stinson Gull wing?

A. Yes.

Q. —type of plane? Are you familiar with that type of plane? A. Yes. [137]

Q. Now, Mr. Smith, were you formerly employed by Alaska Airlines? A. Yes, I was.

Q. Are you familiar with the various beaches up and down Cook Inlet here between here and Homer?

A. Yes.

Q. Are you familiar with the beach known as the cannery beach at Kenai? A. Yes.

Q. Have you been at that beach?

A. I have landed at it.

Mr. Cuddy: I didn't hear the answer.

The Witness: Yes, I have landed near that beach.

The Court: Will you speak a bit louder?

Mr. Davis: Mr. Smith, have you landed on various beaches in this part of Alaska? A. Yes.

Q. Now, in relation to the beach at Kenai—the

(Testimony of William V. Smith.)

Kenai cannery beach—how does that compare with other beaches in this part of the country, as far as being safe for landing aircraft?

Mr. Cuddy: We object, if the Court please—immaterial, and we were not allowed to ask questions as to beaches other than the beach here in question.

The Court: Objection is sustained.

Mr. Davis: Your Honor, I have tied that down to this particular beach.

A. I believe it is a good beach——

Mr. Cuddy: Wait a minute.

Mr. Davis: Don't answer until the Court rules. I asked him how this beach compares to other beaches and he has been on this beach.

The Court: Well, doesn't that open up the question of landing on various other beaches? I think you are going too far afield, counsellor. I think you ought to confine yourself to the beach in question.

Mr. Davis: All right, your Honor. Now, Mr. Smith, with regard to a Stinson type 9 airplane, you say you are familiar with that type?

A. Yes. [138]

Q. Know what kind of tires it has on it?

A. Well, almost all of them have small wheels on them—small tires.

Q. In your opinion, Mr. Smith, would there be anything unsafe about landing an airplane of that type on the beach at Kenai?

A. No, not with caution.

Mr. Davis: I think that's all. Just a minute, now, they may wish to cross-examine.

(Testimony of William V. Smith.)

Cross-Examination

By Mr. Cuddy:

Q. Have you ever flown a SR9F, Bill?

A. I have flown SR9's, but not the F.

Q. Then you never have flown a ship of this type?

A. Yes, I have.

Q. Have you flown one where it weighs as much as this SR9?

A. Well, I have flown planes that weighed twice as much in worse places.

Q. On this beach?

A. Not that particular beach.

Q. All right, let's stick right to this one beach. Now then, what is the size of the tire on a SR9F?

A. Well, I can give you the approximate diameter.

Q. All right, what would be the diameter?

A. Oh, that tire is probably about 18 inches—approximately.

Q. 18 inches?

A. Approximately. Perhaps a little bit larger.

Q. Are you sure of that?

A. I said approximately.

Q. Approximately that?

A. Uh-huh—yes.

The Court: Is that the diameter?

The Witness: The diameter of the wheel—outside diameter.

Mr. Cuddy: You mean the diameter?

A. The diameter of the whole wheel.

Q. Of approximately 18 inches?

A. Yes.

The Court: I am not sure that I understand it.

(Testimony of William V. Smith.)

Will you explain it again, Mr. Smith, what this diameter is, so that we all get it straight? Is that the diameter of the tire itself [139] —of the round tire?

The Witness: No, of the wheel as a whole, including the tire.

The Court: Oh, the wheel as a whole?

The Witness: Including the tire.

The Court: All right.

Mr. Cuddy: What would be the width through the tire?

A. That's about—that depends on the Stinson; some have seven, some have nine, and some have ten.

Q. Now, then, what planes have you landed on this particular beach?

A. I never landed a Stinson in there.

Q. You never did land a Stinson there?

A. Oh that beach, no.

Q. And what planes have you landed there?

A. Well, I have landed on that particular beach—I have landed there with Cubs.

Q. A light plane? A. Uh-huh.

Q. And on that particular beach the only plane that you have landed has been a light plane?

A. Yes.

Mr. Cuddy: That's all.

Redirect Examination

By Mr. Davis:

Q. Now, Mr. Smith, one particular question: At the time you landed there did you observe the ground of the beach? A. Yes.

(Testimony of William V. Smith.)

Q. And what kind of ground is it? What's the material of which the beach is made up?

A. Well, it depends upon which part of the beach.

Q. Well, take the north end of the beach—up beyond the cannery toward the river?

A. Well, there is hard sand in there and further on there's mud—mud flats.

Q. Was it hard packed sand? A. Yes.

Q. Or was it soft? A. No, it was hard.

Q. Now, the tide comes up on that beach every day, does it?

A. Well, I presume it does. I don't know; I haven't been there.

Mr. Davis: That is all. [140]

Mr. Cuddy: No further questions.

The Court: That is all, Mr. Smith. You may step down.

Mr. Davis: Thank you, Bill.

The Court: Any further testimony?

Mr. Davis: The defendant rests.

The Court: Next come the instructions to the jury.

Mr. Davis: If the Court please, I think Mr. Manders wishes to renew his motions.

Mr. Manders: I don't know whether you desire to have the jury excused or not?

The Court: No; I will do whatever counsel suggests. Do you wish the jury to be excused?

Mr. Manders: I think they had better be excused.

The Court: Ladies and gentlemen, will you retire to the jury room for a few minutes?

(Jury retired to the jury room.)

The Court: You may proceed, Mr. Manders.

Mr. Manders: At this time, your Honor, I wish to renew the same motions that were made this morning at the time of the close of plaintiff's case—the same two motions.

The Court: The motions and each of them will be denied, and in this case, as in every other case, exception will be noted as of course to all adverse rulings of the Court.

Mr. Davis: If the Court please, I would like the record to show, if I may, that I would like to concur in the motions and renew the motions at this time on behalf of Mr. Dorothy.

The Court: Record will so show.

Mr. Davis: And I would like the record also to show I concurred in the requested instructions submitted by Mr. Manders on behalf of his client. I would like to request the same instructions for Mr. Dorothy.

The Court: The record will show that the requested instructions [141] actually physically submitted by Mr. Manders yesterday on behalf of defendant Pacific Northern Airlines, are submitted also on behalf of defendant Don Dorothy.

Mr. Manders: Here are four additional instructions, your Honor. I have given copy to Mr. Cuddy and I would like to present them to the Court.

The Court: You may send them up to the desk.

Well, the instructions as prepared contain nothing on that precise subject. I think there isn't any doubt about the validity of the rule of law contained in the instructions. I have already covered the subject matter of Defendant's Requested Instruction No. 21. I shall give Defendant's Requested Instruction No. 20 as 7-C, only the words "of trover" in the second line will be stricken out since the words may mean nothing to the jury, and substitute the words "such as this." The instruction then will read:

"The market value of the property at the time of its conversion is generally the measure of damage in an action such as this. You may take into consideration its worth a reasonable time before and subsequent to the time of the alleged conversion in this action."

Mr. Davis: That is going to be what?

The Court: It will be 7-C. It will be re-typed.

The jury may be recalled.

Mr. Davis: There are two technical objections I have to these instructions I thought the Court might like to have called to his attention. In Paragraph 1, Instruction 1, Line 20, in talking about what the complaint alleges. it says that the plaintiff alleges that Dorothy flew the aircraft "from Anchorage, Alaska, to Kenai, Alaska, where the said defendant Dorothy landed the airplane upon a beach of Cook Inlet"; It is my remembrance that the complaint says "Kasilof," your Honor, instead of "Kenai" and I believe that that should be corrected.

Then on the next page, the last line leaves out—I think the Court meant to say “therefore” and the “fore” isn’t there— [142] on 1-A.

The Court: Yes—“therefore.”

Mr. Davis: Paragraph VI, your Honor, of the complaint is the one I had reference to.

The Court: In the foregoing paragraph the averment is that the defendants wrongfully and unlawfully flew such aircraft from Anchorage, Alaska, to Kasilof and Kenai.

Mr. Davis: That is right, your Honor, but where it talks about landing the aircraft on the beach of Cook Inlet, I believe it is strictly Kasilof.

Mr. Kay: Your Honor, of course, at the time this complaint was drawn we had very little knowledge of the actual facts. I wonder if a motion to conform the pleadings—amend the pleadings to conform to the proof might be in order in that regard. The complaint alleges a beach “near the town of Kasilof.” It should be a beach “near the town of Kenai.”

The Court: Does counsel wish to amend the complaint in that particular?

Mr. Kay: I do move to so amend the complaint.

The Court: It may be amended by striking the word “Kasilof” in Paragraph VI of the complaint, and the word “Kenai” inserted in lieu thereof, and the clerk may make the change. Then the instruction may remain as it is.

The jury may be recalled.

(Jury was recalled.)

The Court: Without objection the record will show all members of the jury to be present.

Ladies and gentlemen of the jury (reading):

It now becomes the duty of the Court to instruct you as to the law that will govern you in your deliberations upon and disposition of this case. When you were accepted as jurors you obligated yourselves by oath to try well and truly the [143] matters at issue between the plaintiff and the defendants in this case, and a true verdict render according to the law and the evidence as given you on the trial. That oath means that you are not to be swayed by passion, sympathy or prejudice, but that your verdict should be the result of your careful consideration of all the evidence in the case. It is equally your duty to accept and follow the law as given to you in the instructions of the Court, even though you may think that the law should be otherwise. It is the exclusive province of the jury to determine the fact in the case, applying thereto the law as declared to you by the Court in these instructions, and your decision thereon as embodied in your verdict, when arrived at in a regular and legal manner, is final and conclusive upon the Court. Therefore, the greater ultimate responsibility in the trial of the case rests upon you, because you are the triers of the facts.

The plaintiff, C. A. McCandless, has sued the defendants Don Dorothy and Pacific Northern Airlines, Inc., a Corporation, in this action claiming that in September, 1947, the plaintiff was the owner of a Stinson airplane, SR9F type, equipped with a 450-

horsepower Pratt and Whitney engine; that in early September the defendant, Don Dorothy, who was then and there an employee and acting as an agent of the defendant Pacific Northern Airlines, Inc., approached the plaintiff with a view of considering the purchase of the airplane by the defendant corporation, and thereupon it was verbally agreed that the said defendant Dorothy might take the airplane to the hangar owned by the defendant corporation at Merrill Field, Alaska, for the purpose of having the same examined and inspected by employees of the defendant corporation; but that thereafter the said defendant [144] Dorothy, acting for and in behalf of said defendant corporation, wrongfully and unlawfully took possession of said airplane and converted the same to the use and benefit of the defendant corporation and on September 6, 1947, flew said airplane from Anchorage, Alaska, to Kenai, Alaska, where the said defendant Dorothy landed the airplane upon a beach of Cook Inlet; that in making said landing the airplane was wrecked and as a result of said wreck was rendered totally worthless; that the value of the airplane on September 6, 1947, was \$8,500.00 and, therefore, plaintiff demands judgment against said defendants for that sum.

The defendants Dorothy and Pacific Northern Airlines, Inc., have answered separately but their answers are substantially to the same effect. The answers of defendants deny any wrongful taking of the airplane and deny that the value thereof on September 6, 1947, was \$8,500.00. The defendant Dorothy states in his answer that the aircraft at the time

the defendants took possession of the same was of a value not exceeding \$6,000.00. The defendant corporation in its answer avers that the value of the aircraft at said time did not exceed \$3,500.00. Both defendants assert that the plaintiff entered into an oral agreement with Dorothy, the latter acting for the defendant corporation, wherein and whereby it was agreed that the plaintiff chartered the airplane to the defendants upon an agreed and stipulated rental of \$35.00 per hour; that the defendant Dorothy was operating said plane on September 6, 1947, and while landing on the beach at Kenai, Alaska, the right wheel of the aircraft became locked causing the airplane to veer sharply to the right and into the mud below the beach; that the incoming tide partly covered the airplane and caused damage thereto; that the beach at the place selected by defendant Dorothy was hard and was in safe condition to make a landing and that, in fact, the landing was made safely and no damage would have resulted except for the mechanical failure of the aircraft the [145] cause of which the defendants assert is unknown to them; that the defendants were not negligent in any manner in making the landing at the time and in the place described; that all reasonable precautions were used in flying and landing the aircraft.

The plaintiff in his replies to the defendants' answers denies that the taking of the airplane by the defendants was under any rental or charter agreement and denies generally the allegations of defendants answers inconsistent with the plaintiff's complaint.

When you retire to consider of your verdict you will take with you to the jury room the pleadings in this case consisting of the plaintiff's complaint, the defendants' answers thereto and the plaintiff's replies to said answers. You should therefore read and consider the pleadings carefully in order to determine the respective claims of the plaintiff and the defendants in this action.

Both of the defendants by their answers have admitted the allegations contained in Paragraphs I, II and III of the plaintiff's complaint, as follows: That at all times mentioned in the complaint the plaintiff was the owner of the airplane described in Paragraph I of the complaint; that at all times mentioned in the complaint the defendant Dorothy was an employee and agent of the defendant Pacific Northern Airlines, Inc., a corporation; and that said defendant Pacific Northern Airlines, Inc., is a corporation. Hence it was not necessary to offer any proof on any of the allegations so admitted.

In this case, as in all civil cases, the burden is upon the plaintiff to prove his case by a preponderance of the evidence only, and not, as in criminal cases, beyond reasonable doubt. Preponderance of evidence means the greater weight of evidence. If the evidence in your mind is equally balanced as [146] between the plaintiff and defendant, then the verdict should be for the defendant, because the burden is upon the plaintiff to present evidence of greater weight than that in favor of the defendant before plaintiff is entitled to recover.

As stated in the plaintiff's complaint, this is an

action for conversion of personal property. Conversion consists in the exercise of dominion and control over property inconsistent with and in denial of the rights of the true owner or the party having the right of possession. It is the exercise of such a claim of right or dominion over the property as assumes that the claimant is entitled to possession so that the true owner or the party rightfully entitled to possession is deprived of the property. Conversion may be otherwise defined as any distinct act of dominion exerted over another's property in denial of the right of the true owner or possessor to the possession of the property.

If you find by a preponderance of the evidence that on or about September 6, 1947, the plaintiff was the owner and entitled to the possession of the airplane described in the complaint at Merrill Field, Alaska, and that on said day the defendants took possession of said airplane, without right and without authority from the plaintiff, and the defendants did not return said airplane to the possession of the plaintiff and converted said property to their own use, then your verdict should be for the plaintiff in such sum as, under the evidence and the instructions of the Court, you find to have been the fair market value of the airplane at that time.

Any person who intentionally dispossesses another of chattel property without consent of the owner or possessor is liable as a converter for the value of the property, and this is true even though the person who takes the property from the owner or person in possession takes it under a mistaken [147] belief that he

is entitled to do so or has the consent of the owner, unless that mistaken belief was induced by the owner or person in possession. If you find by a preponderance of the evidence that the defendants took possession of the airplane described in the pleadings without the consent or agreement of the plaintiff, but because of a mistaken belief that they were entitled to use it, then your verdict should be for the plaintiff for such amount as you find the plaintiff justly entitled to receive under the evidence and these instructions. In such case the measure of damages is the reasonable worth and market value of the property, shown by the evidence, at the time of such taking and conversion.

The defendants, as you know, claim that they had the right to take and use the airplane under a charter or lease given them by the plaintiff. Such a delivery of a chattel from one person to another under the circumstances claimed by the defendants is known in law as a bailment. A bailment is a delivery of a thing in trust for some specific object or purpose and upon a contract expressed or implied to conform to the object or purpose of the trust. A bailment may otherwise be defined as a delivery of personal property for some particular purpose, or on mere deposit under contract, expressed or implied, that after the purpose has been fulfilled the property shall be re-delivered to the person who first delivered it, or otherwise dealt with according to his directions, or kept until he reclaims it, as the case may be. The person who delivers a personal chattel to another under circumstances coming within the definition of the term "bailment"

is called the bailor, and the person to whom such chattel has been delivered is called the bailee.

Under contract to let an airplane for hire it is the duty of the bailor to furnish an airplane reasonably fit and proper [148] for the use intended. Contract for rental of an airplane, and the consideration of payment of fixed amount, is a bailment for hire and is for the mutual benefit of both parties.

A contract of bailment, like any other contract, is an agreement between two or more persons, upon a sufficient consideration, to do or not to do a particular thing. The duration of a contract of bailment is to be determined from the terms of the contract itself. In this case if you find by a preponderance of the evidence that the parties mutually agreed that the defendants might take the airplane to the hangar of the Pacific Northern Airlines, Inc., for inspection purposes, but no more, and that no further contract was entered into between the parties, and you further find that the airplane was taken to the hangar of the defendant corporation and inspected and returned to its previous location, then the contract of bailment terminated upon the return of the airplane to its original location.

If you find that the defendants took possession of the airplane under an oral agreement with the plaintiff whereby the defendants were permitted to use the plane for air traffic and transport, for hire, and if you further find that the defendant Dorothy informed the plaintiff of the purpose for which the defendants were to use the airplane, then and in that event it was the duty of the plaintiff to furnish de-

fendants with an airplane suitable and adequate for the purposes agreed upon and upon furnishing the airplane under those circumstances, if they existed, there was an implied warranty by the plaintiff that the airplane was reasonably suitable and adequate for the purpose for which it was agreed the airplane should be used. [149]

If you find that the defendants took possession of the airplane under an agreed charter or lease at an agreed rental of \$35.00 per hour so that the contract was one of bailment for hire with the right of defendants to use the airplane, then and in such event the defendants would not be liable for damage to the airplane unless you further find that there was some negligence on the part of the defendants, or one of them, which directly contributed to the damage, for under those circumstances if there was no such negligence the loss must be borne by the bailor, who is the plaintiff in this action. It is for you to determine from all of the evidence whether the defendant was negligent in the care of plaintiff's airplane, and whether defendants acted in the care and protection of plaintiff's airplane as an ordinarily prudent person would have acted under the same or similar circumstances.

A bailee of personal property for hire is not an insurer of the safety of such personal property while under his control. By this is meant, that he is not liable merely because such personal property sustains an injury or is damaged. He is liable, if at all, because he had done some act or thing with reference to the care of such personal property which an

ordinarily prudent person similarly situated would not have done, or has failed to do some act or thing with reference to its care which an ordinarily prudent person, similarly situated would have done. In other words, a bailee of personal property for hire is required to exercise such ordinary care and diligence with reference to the caring for such property to prevent injury thereto while under his control that a person of ordinary prudence would have exercised in caring for property of the same kind, in the same situation and under the same or similar circumstances and conditions. He is required to exercise such ordinary care with reference to the property as an ordinarily [150] prudent person engaged in the same business would have exercised under similar circumstances and conditions.

However, a bailee for hire of personal property is bound to exercise ordinary and reasonable care in the use and possession of such property, and failure to exercise such care is negligence; and if the property is damaged by the negligence of the bailee, and if the negligence of the bailee is the direct and proximate cause of the damage, then the bailee is liable to the bailor for such damage. So in this case if you find that the oral agreement or contract between the parties was one of charter or lease for hire of the airplane at \$35.00 per hour, as alleged by the defendants, and if you further find that the airplane was wrecked or damaged as the proximate result of the negligence of the defendants, or either of them, then the plaintiff is entitled to recover for the damage sustained by such negligence. Where property is in the exclusive possession of a bailee for hire and is damaged in a

way that ordinarily does not occur without negligence, the burden of proof is upon the bailee to show that the injury was not occasioned by his negligence.

In the instructions heretofore given reference has been made to the rights and liabilities of the parties under a contract of bailment if any such contract existed between the parties in this case. The rights of the parties are entirely governed by the contract between them. If you find from a preponderance of the evidence that the averments of plaintiff's complaint are true and he permitted the defendants to take possession of the airplane only for the purpose of moving the same to the hangar of the defendant corporation so that it might be examined by the mechanics of said corporation and for no other purposes, [151] then the plaintiff is entitled to recover in this action because the contract of bailment between the parties under such circumstances would forbid the defendants from flying the plane or from moving it except to and from the hangar of the defendant corporation.

On the other hand, if you find the averments of the defendants' answers with respect to a charter or lease of the plane for hire at the stipulated rental of \$35.00 per hour are true, and that the defendants used said plane under such an agreement with the plaintiff, then and in that event the defendants would be liable for loss or damage to the plane only in case such loss or damage resulted from the negligence of the defendants or one of them, and by negligence is meant a lack of such ordinary care as an ordinarily prudent person would have exercised under similar circumstances. Accordingly, the first issue for you to

decide really is what the agreement was between the plaintiff and the defendant Dorothy as to the use, if any, which Dorothy and the defendant corporation might make of the plaintiff's airplane.

If you determine that the averments of the plaintiff's complaint with respect to the nature of the oral contract or agreement between the parties is true, then the plaintiff is entitled to recover without regard to negligence or lack of negligence on the part of defendants in operating the airplane.

But if you find that the oral agreement of the parties was a bailment for hire at \$35.00 per hour under which the defendants were authorized to use the airplane, then you must determine whether or not the defendants were negligent in operating the airplane and whether that negligence, if any, was the proximate cause of damage to the airplane: for if the defendants were so negligent and if that negligence was the proximate cause of damage to the airplane, then the plaintiff [152] is deserving of a verdict at your hands, but if the defendants were not negligent under the circumstances last mentioned, namely, under a contract of hire of the airplane at \$35.00 per hour, or if the negligence of defendants, if any, was not the proximate cause of damage to the airplane, then the defendants are entitled to the verdict.

The term "proximate cause" has been used in these instructions. By proximate cause of damage is meant that act or omission, that cause, which in a natural, continuous, connected and unbroken operation, without any new and independent intervening cause, produces the damage complained of, and without which

the damage would not have occurred. An alleged act of negligence is the proximate cause of damage where the damage is the natural and probable result of the negligence, and where the damage would not have occurred except through such negligence.

The market value of the property at the time of its conversion is generally the measure of damage in an action such as this. You may take into consideration its worth a reasonable time before and subsequent to the time of the alleged conversion in this action.

The law makes you, subject to the limitations of these instructions, the sole judges of the effect and value of evidence addressed to you.

However, your power of judging the effect of evidence is not arbitrary, but is to be exercised with legal discretion and in subordination to the rules of evidence.

You are not bound to find in conformity with the declarations of any number of witnesses which do not produce [153] conviction in your minds, against the declarations of witnesses fewer in number, or against a presumption or other evidence satisfying your minds.

A witness wilfully false in one part of his testimony may be distrusted in others.

Testimony of the oral admissions of a party should be viewed with caution.

Evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict, and therefore, if the weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory evidence

was within the power of the party, the evidence offered should be viewed with distrust.

The laws of Alaska provide that all questions of law, including the admissibility of testimony, the facts preliminary to such admission, the construction of statutes and other writings, and other rules of evidence, are to be decided by the Court, and all discussions of law addressed to the Court; and although the jury has the power to find a general verdict, which includes questions of law as well as fact, you are not to attempt to correct by your verdict what you believe to be errors of law upon the part of the Court.

All questions of fact, other than those heretofore mentioned in these instructions, must be decided by the jury, and all evidence thereon addressed to them. Since the law places upon the Court the duty of deciding what testimony may be admitted in the trial of the case, you should not consider any testimony that may have been offered and rejected by the Court, or admitted and thereafter stricken out by the Court.

You are the sole judges of the credibility of the witnesses. In determining the credit you will give to a witness and the [154] weight and value you will attach to his testimony, you should take into account the conduct and appearance of the witness upon the stand; the interest he has, if any, in the result of the trial; the motive he has in testifying, if any is shown; his relation to and feeling for or against any of the parties to the case; the probability or improbability of the statements of such witness; the opportunity he had to observe and be informed as to matters respecting which he gave evidence before you, and the

inclination he evinced, in your judgment, to speak the truth or otherwise as to matters within his knowledge.

The law forbids quotient verdicts. A quotient verdict is arrived at by having each juror write the amount of damages or compensation to which he believes the plaintiff is entitled, adding the amounts so set down, and then dividing the total by the number of jurors, usually twelve, the resulting figure being given as the verdict of the jury. Such verdicts are highly improper and under no circumstances should you resort to that method of adjusting differences of opinion among yourselves.

You are to consider these instructions as a whole. It is impossible to cover the entire case with a single instruction, and it is not your province to single out one particular instruction and consider it to the exclusion of the other instructions.

As you have been heretofore instructed, your duty is to determine the facts from the evidence admitted in the case, and to apply to these facts the law as given to you by the Court in these instructions.

During the trial I have made no comment on the facts and expressed no opinion in regard thereto. If I have, or if you think I have, it is your duty to disregard that opinion entirely, because the responsibility for the determination of the facts in this case rests upon you, and upon you alone. [155]

Upon retiring to your jury room you will elect one of your members foreman who will speak for you and sign the verdict unanimously agreed upon.

You will take with you to the jury room these instructions, the pleadings and exhibits in the case,

and two forms of verdict which I have prepared for your use.

If you find for the plaintiff and against the defendants your foreman will insert in the appropriate place in your verdict which has been prepared for this contingency and which is marked Verdict No. 1, the amount which you find the plaintiff is entitled to recover from the defendants, not to exceed the sum of \$8,500.00, and your foreman will thereupon date and sign the verdict and return the same into court as your verdict.

If you find for the defendants and against the plaintiff then your foreman will date and sign the verdict which has been prepared for that contingency and which is marked Verdict No. 2, and return the same into court as your verdict.

The form of verdict not used will be destroyed by your foreman.

With your verdict you will return into court these instructions, the exhibits and the pleadings in the case.

Dated at Anchorage, Alaska, this 25th day of February, 1948.

And I have signed the same as District Judge.

Now, the counsel for the parties may come to the desk and take exceptions to the instructions given and those requested instructions which the Court declined to give, in order that, if the Court is wrong upon the law, an opportunity will be given to correct the error in the Court of Appeals.

(The following proceedings were had in the presence of the jury but not in the hearing of the jury.) [156]

The Court: Plaintiffs may tax exceptions first.

Mr. Kay: We have no exceptions to the instructions.

The Court: Do you have any exceptions to the failure of the Court to give the instructions you requested?

Mr. Kay: None.

The Court: Very well.

Mr. Kay: Pardon me, your Honor. I didn't check to see what instructions you failed to give.

The Court: You may look. And I will say to all counsel, if you overlook any exceptions you want to take you may come to the desk and take them any time before the jury retires.

Mr. Davis: I would like to suggest to the Court that you have a third form of verdict here to take care of the contingency we discussed in your chambers this morning about the jury possibly wanting to bring in a verdict for or against one of the defendants and not the other.

The Court: I took a hasty look at the text on the subject in *Ruling Case Law* and so far as I can tell the prevailing rule is that in the case of conversion the agent is bound as well as the principal. I may be mistaken.

Mr. Davis: I think that is good law only I don't think it is necessarily true. In other words, the jury may decide one is liable and not the other. As I told you in chambers this morning, I didn't feel as a matter of law you could say so, but I thought the jury might find the facts warranted holding one defendant liable and not the other.

Mr. Kay: I am afraid—I made the same hasty

check that you did, your Honor, and I was afraid that it would be reversible error if such a course were followed.

The Court: Well, if all of counsel agree to it I will give that instruction. That is, I will tell the jury if they find against one defendant but not the other, they may render a verdict accordingly, but if any of counsel here objects to the giving of that instruction I do not think I will give it. [157]

Mr. Manders: If the Court please, my feeling on that matter is the same as when we discussed it in chambers. I think you have to find as to both of them and not just one separately, because we couldn't be held without the action of the agent.

Mr. Davis: On behalf, then, of the defendant Dorothy, your Honor, I would like to except to the failure of the Court to set up a third form of verdict for that contingency, and also to so much of the last instruction as applied to the fact that two forms of verdict are given and that it is a joint verdict.

The Court: Exception will be noted.

Mr. Davis: On behalf, then, of the defendant Dorothy, I wish to except to the Court's failure to give requested instructions on behalf of defendants No. 1 through 21, inclusive, except insofar as they have been covered by the Court in the instructions as given.

The Court: The exceptions will be noted and each of the instructions submitted by the defendants will be marked "Refused except as covered by instructions given; exception noted." and will be signed and filed with the clerk this day. I think one instruction was copied verbatim. No. 8, I think, is copied

verbatim, but otherwise none of them was copied by adoption of the text to the language, although some of them have been covered in substance. All right, Mr. Davis?

Mr. Davis: I wish to except to that portion of Instruction No. 2——

Mr. Manders: Suppose I go along at the same time and I make the same exception on behalf of Pacific Northern Airlines.

The Court: Very well, exception will be noted on behalf of both defendants.

Mr. Kay: In other words, Mr. Manders is excepting to the failure of the Court to give a separate verdict? [158]

Mr. Manders: No, to failure to give our requested instructions.

The Court: Mr. Manders I understand, objects to any form of verdict whereby the jury might find against one of the defendants but not both.

Mr. Davis: I wish, then, to except to that part of Instruction No. 3 and 3-A which is a continuation of 3, which has to do with mistaken belief that he was entitled to take the property.

The Court: The exception will be noted.

Mr. Davis: ——for the reason, your Honor, that without something additional the jury may feel that because the plaintiff thought that he didn't have the contract here that there was no contract.

Mr. Manders: And Pacific Northern Airlines takes the same exception.

The Court: Exceptions will be noted on behalf of the defendants.

Mr. Davis: I would like to except, your Honor, on behalf of the defendant Dorothy to that portion

of Instruction No. 6-A, the latter portion of it, concerning "Where property is in the exclusive possession of a bailee for hire," and so forth, to the end of the instruction, on the ground there is no evidence to support that instruction.

Mr. Manders: And the same exception on behalf of Pacific Northern Airlines.

The Court: Exception will be noted on behalf of both defendants.

Mr. Davis: You have already covered, I think, my objections to Instruction No. 12 on the question of the separate verdict.

The Court: Exception will be noted.

Mr. Kay: I would respectfully like to except to failure to give such instructions as I have requested which were not given, your Honor.

The Court: Very well, as in the case of defendants' instructions, [159] exception will be noted and each of the instructions submitted by the plaintiff will be marked "Refused except as covered by instructions given. Exception noted." And will be signed by me and filed with the clerk, to become a part of the record upon appeal.

Mr. Kay: Thank you, your Honor.

Mr. Davis: Thank you, your Honor.

The Court: Court will stand in recess until 3:52.

(Whereupon recess was had at 3:42 o'clock p.m.)

(Following recess argument was had to the jury by the respective counsel.)

(Mr. W. B. Healy was duly sworn as bailiff in charge of the jurors, and at 5:01 o'clock p.m. the trial jury retired in charge of their sworn bailiff

to deliberate upon their verdict, it having been stipulated by and between respective counsel that a sealed verdict be returned at 10:00 o'clock a.m. of the following morning.)

(At 5:45 o'clock p.m., the following occurred:)

The Court: Roll may be called of the jurors in the box.

The Clerk: Mr. Walter Brown not here; all others present.

The Court: Ladies and gentlemen, as you know, Mr. Brown, one of your number, is ill and the doctor has recommended that he go to bed immediately. I have consulted with Mr. Cuddy, representing the plaintiff, and both Mr. Davis and Mr. Manders representing the defendants, and they have stipulated orally that the remaining 11 of you may return a verdict, and so you may proceed to your deliberations and return a verdict just the same as though you had 12 instead of 11.

You may now retire to consider of your verdict and court will stand adjourned until tomorrow morning at 10:00 o'clock.

(At 10:00 o'clock a.m. of Thursday, February 26, 1948, the jury, in open court, returned a verdict for the plaintiff and against the defendants and found that the plaintiff is entitled [160] to recover of and from the defendants the sum of \$7,500.00.)

The Court: Do counsel wish the jury polled?

Mr. Davis: Not I, your Honor.

Mr. Manders: Neither do I, your Honor.

The Court: Very well, the verdict may be received and filed and entered. The envelope may be filed.

Thank you for your service, ladies and gentlemen. You may now take your seats in the main body of the court room.

Mr. Manders: At this time, your Honor, I wish to make a motion for entry of judgment in favor of both defendants notwithstanding the verdict of the jury.

The Court: Do you wish to argue the motion?

Mr. Manders: We can argue it later, your Honor.

The Court: Very well. The fact that the motion has been made will be of record. It may be argued later. It may be put on the motion calendar to come up in regular order, unless counsel by stipulation or otherwise bring it up earlier.

* * * *

(On Friday, February 27, 1948. the following occurred:)

Mr. Cuddy: Your Honor, may I present just one item? Mr. Manders has asked that we enter into a stipulation in reference to the case just tried, but it is based upon a motion that he wishes to argue that he is not prepared to argue now. May we argue it Monday, or Tuesday?

The Court: Yes.

Mr. Manders: I prefer Tuesday.

Mr. Cuddy: Tuesday at 10:00 a.m.?

Mr. Manders: And my motion that the time within which to file motion for new trial be extended 10 days after the ruling of the Court on the motion for judgment notwithstanding the verdict.

The Court: Is there any objection?

Mr. Cuddy: No. [161]

The Court: Very well, minute order may be made accordingly. The minute order is that the motion for

judgment notwithstanding the verdict will be argued at 10:00 o'clock on Tuesday morning and that the time for filing motion for new trial is extended until 10 days after that date.

Mr. Manders: After the ruling on the motion.

The Court: After the ruling on the motion for judgment notwithstanding the verdict.

The Court thereafter made and had entered the following minute orders denying the motion for judgment notwithstanding the verdict:

“Now at this time upon oral motion of John E. Manders, of counsel for defendant and with W. W. Cuddy, of counsel for plaintiff not objecting thereto,

It Is Ordered that the time for filing motion for new trial in Cause No. A-4725, entitled C. A. McCandless, plaintiff, versus Don Dorothy and Pacific Northern Airlines, Inc., a corporation, defendants, be, and it is hereby, extended to 10 days after decision of motion re judgment notwithstanding verdict.”

“Now at this time hearing on oral motion re judgment notwithstanding verdict in Cause No. A-4725, entitled C. A. McCandless, plaintiff, versus Don Dorothy and Pacific Northern Airlines, Inc., a corporation, defendants, came on regularly before the Court, the plaintiff not being present but represented by Wendell P. Kay, of his counsel, the defendants not being present but represented by John E. Manders. The following proceedings were had, to-wit:

Argument to the Court was had by John E. Manders, for and in behalf of both defendants, Don

Dorothy and Pacific Northern Airlines, Inc., a corporation.

No argument by plaintiff.

Whereupon the Court having heard the argument of respective counsel and being fully and duly advised in the premises, overruled motion."

Thereafter defendants made their motion for a new trial, and said motion reading as follows:

"MOTION FOR A NEW TRIAL

"Come now the defendants above-named and move this Honorable Court for an order setting aside and vacating the verdict and judgment of the jury heretofore rendered and entered in favor of the plaintiff and against the defendants in the above-entitled action, and feeling aggrieved by such verdict and judgment move that a new [162] trial of said action be granted to said defendants for the following causes alleged by defendants as materially effecting their substantial rights and the rulings of the court which were prejudicial to their substantial rights, to-wit:

Errors in law occurring at the trial and excepted to by the defendants:

1. The court erred in overruling the respective demurrers of defendants to the complaint of plaintiff on file herein.
2. The court erred in denying defendants' motion at the close of plaintiff's case to grant a non-suit on the ground that plaintiff had failed to prove a case as laid in his complaint.
3. The court erred in denying defendants' motion at the close of plaintiff's case to grant a directed ver-

dict on the ground that plaintiff had failed to sustain the allegations of his complaint or of the relief demanded, and that plaintiff had failed to show any conversion of the property, the subject matter of his complaint.

4. The court erred in again denying defendants' motion for a non-suit at the close of the case on the ground that plaintiff had failed to prove a case as laid in his complaint.

5. The court erred in again denying defendants' motion for a directed verdict at the close of the case on the ground that plaintiff had failed to sustain the allegations of his complaint or of the relief demanded therein, and that plaintiff had not shown any conversion of the property, the subject matter of said complaint.

6. The court erred in denying defendants' motion for a judgment notwithstanding the verdict on the ground that plaintiff had failed to prove a case as laid in his complaint and further that plaintiff had failed to sustain the allegations of the complaint or of the relief demanded therein and that plaintiff had not shown any conversion of the property, the subject matter of plaintiff's complaint.

Wherefore, defendants move said court to grant a new trial in the above-entitled action.

Dated this 3rd day of March, 1948.

/s/ EDWARD V. DAVIS,
Attorneys for Defendant, Don Dorothy.

/s/ JOHN E. MANDERS,
Attorney for Defendant, Pacific Northern Airlines,
Inc." [163]

And thereafter the Court made and entered its order denying defendants' motion for a new trial, which order reads as follows:

“No. A-4725 HEARING ON MOTION
FOR NEW TRIAL

Now at this time hearing on motion for new trial in Cause No. A-4725, entitled C. A. McCandless, plaintiff, versus Don Dorothy and Pacific Northern Airlines, Inc., a corporation, defendants, came on regularly before the Court, the plaintiff not being present but represented by Wendell P. Kay, of his counsel, the defendants not being present but represented by John E. Manders, of their counsel. The following proceedings were had, to-wit:

Argument to the Court was had by John E. Manders, for and in behalf of the defendants.

Whereupon the Court, having heard the argument of respective counsel and being fully advised in the premises, denied motion for new trial.

Thereafter on the 11th day of May, 1948, the term of the Court was extended to and including the 8th day of July, 1948, within which to present, settle and allow the Bill of Exceptions, and perfect the Appeal of defendants in said action, by its order signed and filed on said day. Thereafter said Court by its order duly given, made and filed on the 5th day of June, 1948, extended the time for filing of the record and docketing said action in the U. S. Court of Appeals, to and including the 15th day of July, 1948.

Thereafter and on June 24, 1948, the time of the defendants to file their proposed Bill of Exceptions

in said action was by an order of said Court, signed and filed on said day, extended to and including the 23rd day of August, 1948. Thereafter, on July 8, 1948, the Court by its order, signed and filed on said day, extended the term of said Court for the purpose of presentation, settlement and allowance of the Bill of Exceptions herein to and including the 8th day of September, 1948.

Thereafter and on the 15th day of July, 1948, by its order signed and filed on said day, the time for filing the record and docketing the cause in the United States Court of [164] Appeals for the Ninth Circuit was extended to and including the 13th day of September, 1948.

Thereafter and on the 23rd day of August, 1948, by its order, signed and filed on that date, the time of defendants to file their proposed Bill of Exceptions was extended to and including the 22nd day of October, 1948.

Thereafter on the 1st day of September, 1948, by its order, signed and filed that day, the time for filing the record and docketing this cause in the United States Court of Appeals for the Ninth Circuit was extended to and including the 1st day of November, 1948, and on said date, said Court, by its order, signed and filed on said date, extended the term of said Court for the purpose of presentation, settlement and allowance of Bill of Exceptions to and including the 1st day of November, 1948.

Thereafter on the 21st day of October, 1948, by its order, signed and filed on said day, the time of defendants to file their Bill of Exceptions was extended to and including the 1st day of November, 1948.

Thereafter on the 1st day of November, 1948, by its order, signed and filed on said day, the time for filing the record and docketing the cause in the United States Court of Appeals for the Ninth Circuit was extended to and including the 1st day of December, 1948, and on said 1st day of November, 1948, the Court by its order, signed and filed on said day, extended the term of said court for the presentation, settlement and allowance for Bill of Exceptions to and including the 1st day of December, 1948.

Thereafter on the 30th day of November, 1948, the Court by its order, signed and filed on said day, extended the term of said Court for the purpose of presentation, settlement and allowance of Bill of Exceptions to and including the 1st day of December, 1948. Thereafter on said day the Court, by its order, signed and filed on said day, extended the time for [165] filing the record and docketing the cause in the United States Court of Appeals, for the Ninth Circuit, to and including the 31st day of December, 1948.

Thereafter on the 31st day of December, 1948, the Court by its order, signed and filed on said day, extended the term of said Court to and including the 31st day of January, 1949, in which to present, settle and allow the Bill of Exceptions and perfect the Appeal of defendants in said action to and including the 31st day of January, 1949. That on said day said Court, by its order signed and filed on said day, extended the time of defendants to present and file their Bill of Exceptions to and the 31st day of January, 1949. That on said day said Court, by its order, signed and filed on said day, extended the time of

defendants for filing of the record and docketing the cause in the United States Court of Appeals, for the Ninth Circuit, to and including the 31st day of January, 1949.

Thereafter and on the 31st day of January, 1949, the Court, by its order, signed and filed on said day, extended the term of said Court for the purpose of presentation, settlement and allowance of Bill of Exceptions to and including the 28th day of February, 1949. That on the said 31st day of January, 1949, the Court, by its order, signed and filed on said day, extended the time of defendants to file their Bill of Exceptions in said cause to and including the 28th day of February, 1949. That on said 31st day of January, 1949, said Court, by its order, signed and and filed on said day, extended the time for filing of the record and docketing of the cause in the United States Court of Appeals, for the Ninth Circuit, to and including the 28th day of February, 1949.

Thereafter on the 26th day of February, 1949, the Court by its order, signed and filed on said day, extended the time of defendants for filing of the record and docketing the cause in the United States Court of Appeals, for the Ninth Circuit, to and including the 1st day of April, 1949. [166]

That on February 26, 1949, the Court, by its order, signed and filed on said day, extended the time of defendants in which to file their proposed Bill of Exceptions to and including the 15th day of March, 1949. That said Court on the 26th day of February, 1949, by its order, signed and filed on said day, extended the term of the Court for the purpose of presentation, settlement and allowance of defend-

ants' Bill of Exceptions to and including the 15th day of March, 1949.

The matters and things hereinabove in this Bill of Exceptions set forth not fully appearing in the record, the said defendants, Don Dorothy and Pacific Northern Airlines, Inc., a corporation, tender and present the foregoing as their Bill of Exceptions in said cause, and pray that the same be settled, allowed, signed and sealed, and made a part of the record in said cause by this Court pursuant to law in such cases.

Dated at Anchorage, Alaska, this 15th day of March, 1949.

.....,
Attorney for Defendant, Pacific Northern Airlines,
Inc.

.....,
Attorneys for Defendant, Don Dorothy.

Service admitted this 14th day of March, 1949.

.....,
Attorneys for Plaintiff. [167]

(Following are the Instructions requested on behalf of the defendants, which were filed with the Clerk of the District Court February 25, 1948, and each of which was subsequently marked: "Refused except as covered by instructions given. Exception noted," and signed by Anthony J. Dimond, District Judge:)

Defendant's Instruction No. 1

A mere detention of another's chattels which rightfully came into one's possession is not an actionable conversion. If, however, the detention be based upon

a negation of the owner's rights, or be accompanied by an intent to convert the property to the holder's own use, a right of action will arise.

Defendant's Instruction No. 2

The jury are instructed that, if you believe from the evidence that the airplane in controversy was hired by the plaintiff, to Pacific Northern Airlines, the defendant, to be used by the latter, and that they were mutually benefitted by the arrangement, then defendant was only required to use such care as ordinarily prudent men take of their property in taking care of the airplane, and if the jury further believes from the evidence that the defendant used such care and diligence in taking care of the airplane, you will find for the defendant.

Defendant's Instruction No. 3

You are instructed that the defendant in this case, in any event, was only bound to use ordinary care in the care of the airplane, and was bound only to take such precautions and adopt such safeguards as an ordinary prudent person would adopt to protect his own property.

Defendant's Instruction No. 4

Bailee of an airplane for the mutual benefit of the bailor and bailee did not become liable as an insurer for any damage that the airplane might sustain while in its [168] possession, but only for failure to exercise ordinary care.

Defendant's Instruction No. 5

Any distinct act or dominion wrongfully exerted

over one's property in denial of his right, or inconsistent with it, is a conversion.

Defendant's Instruction No. 6

The assertion of a title to or of dominion over personal property inconsistent with the right of the owner constitutes a conversion.

Defendant's Instruction No. 7

A conversion consists in an illegal control of the thing converted, inconsistent with the plaintiff's right of property.

Defendant's Instruction No. 8

A bailee of personal property for hire is not an insurer of the safety of such personal property while under his control. By this is meant, that he is not liable merely because such personal property sustains an injury or is damaged. He is liable, if at all, because he had done some act or thing with reference to the care of such personal property which an ordinarily prudent person similarly situated would not have done, or has failed to do some act or thing with reference to its care which an ordinarily prudent person, similarly situated, would have done. In other words, a bailee of personal property for hire is required to exercise such ordinary care and diligence with reference to the caring for such property to prevent injury thereto while under his control that a person of ordinary prudence would have exercised in caring for property of the same kind, in the same situation and under the same or similar circumstances and conditions. He is required to exercise such ordinary care with reference to the property as an ordinarily prudent person engaged in the same

business would have exercised under similar circumstances and conditions. [169]

Defendant's Instruction No. 9

The court instructs you that a bailment may be defined as a delivery of personalty for some particular purpose, or on mere deposit, under contract, express or implied, that after the purpose has been fulfilled it shall be redelivered to the person who delivered it, or otherwise dealt with according to his directions, or kept until he reclaims it, as the case may it.

The person who delivers a personal chattel or chattels to another under circumstances coming within the definition of the term bailment is called the bailor, and the person to whom such such chattel or chattels have been delivered is called the bailee.

Defendant's Instruction No. 10

Where a contract of bailment of property is for the mutual benefit of the bailor and the bailee, the bailee is only bound to use reasonable and ordinary care to protect the property.

Defendant's Instruction No. 11

The court instructs you that a "bailment" may be defined as a delivery of personalty for some particular purpose, or on mere deposit, under a contract, express or implied, that after the purpose has been fulfilled it shall be redelivered to the person who delivered it, or otherwise dealt with according to his directions, or kept until he reclaims it, as the case may be.

The person who delivers a personal chattel or chattels to another under circumstances coming within

the definition of the term "bailment" is called the "bailor" and the person to whom such chattel or chattels have been delivered is called the "bailee".

Defendant's Instruction No. 12

Where a contract of bailment of property is for the [170] mutual benefit of the bailor and the bailee, the bailee is only bound to use reasonable and ordinary care to protect the property.

Where property in the custody of a bailee is accidentally damaged or destroyed, without any negligence on the part of the bailee causing the same, the bailee is not liable for such loss, but the loss must be borne by the bailor. It is for you to determine, however, from all the evidence in the case, whether defendant was negligent in the care of plaintiff's aeroplane and whether defendant or its agents acted in the care and protection of plaintiff's aeroplane as an ordinarily prudent person would have acted under the same or similar circumstances.

Defendant's Instruction No. 13

The court instructs you that if the defendant informed the plaintiff of the purpose for which it was to use the airplane, and trusted the plaintiff to furnish them with an airplane suitable and adequate for such purpose, and the plaintiff understood to do this, and thereupon furnished this airplane for that purpose, there was an implied warranty by the plaintiff that the airplane was reasonably suitable and adequate for the purpose for which it was agreed upon.

Defendant's Instruction No. 14

Custody distinguished—Letting of chattel for hire constitutes "bailment" under which bailor retains general ownership and bailee has possession as distinguished from mere custody and where chattel is let for hire, bailee acquires, against strangers at least, special property in the subject of bailment.

Defendant's Instruction No. 15

Contract for rental of an airplane, and consideration of payment of fixed amount is a "bailment for hire," and hence for mutual benefit for both.

Defendant's Instruction No. 16

"Under contract to let airplane for hire, it is the duty of the bailor to furnish an airplane reasonably fit and proper for the use intended."

Defendant's Instruction No. 17

A "bailment" is the delivery of a thing in trust for some specific object or purpose and upon a contract expressed or implied to conform to the object or purpose of the trust.

Defendant's Instruction No. 18

The measure of damages for conversion is market value of the property at time and place of conversion, but if returned, value at time of return is deducted.

Defendant's Instruction No. 19

If you find that this property has a market value at the time and place of conversion, that would be the measure of damages.

The general rule is well established that the market value of the property at the time and place of conversion of personal property is the proper measure of damages.

Defendant's Instruction No. 20

The value of the property at the time of its conversion is generally the measure of damage in an action of trover. You may take into consideration its worth a reasonable time before and subsequent to the time of the alleged conversion in this action.

Defendant's Instruction No. 21

If you find that an agreement of rental or charter for the use of the airplane involved in this action was entered into then, and in that event, judgment should be in favor of defendants.

[Endorsed]: Filed March 15, 1949. [172]

[Title of District Court and Cause.]

STIPULATION SETTLING BILL OF
EXCEPTIONS

It is hereby stipulated and agreed by and between counsel for plaintiff and defendants above named, that the foregoing statement of the testimony introduced at the trial of the above-entitled action, together with the motions therein referred to and rulings thereon, is a true, correct and accurate statement thereof.

It Is Further Stipulated and Agreed that Bill of Exceptions may be approved and settled as the Bill

of Exceptions immediately and without further notice.

Dated at Anchorage, Alaska, this 14th day of March, 1949.

/s/ WENDELL P. KAY,
Attorney for Plaintiff.

/s/ EDWARD V. DAVIS,
Attorney for Defendant,
Don Dorothy.

/s/ JOHN E. MANDERS,
Attorney for Defendant, Pacific Northern Air-
lines, Inc.

[Endorsed]: Filed March 15, 1949. [173]

[Title of District Court and Cause.]

ORDER SETTLING BILL OF EXCEPTIONS

The defendants in the above-entitled action having applied to the Court for an order approving the foregoing Bill of Exceptions in the above-entitled action, and plaintiff and defendants by and through their respective counsel having stipulated that said Bill of Exceptions is a true, correct and accurate statement of all the testimony introduced in the trial of said cause and all the motions made and the Court rulings thereon, and having stipulated that said Bill of Exceptions may be approved and settled as the Bill of Exceptions in said cause without further notice; and

It further appearing that said Bill of Exceptions contains a statement of the evidence in said cause,

and is complete and correct, and said Bill of Exceptions, motions made therein and the Court's rulings thereon, is complete and correct, and said Bill of Exceptions having been heretofore presented to the Court for settlement within the time allowed by law and the rules of this Court, and the Court being fully advised in the premises, it is therefore

Ordered, that the foregoing Bill of Exceptions be, and the same hereby is approved and settled as the Bill of Exceptions in the above-entitled cause upon appeal of the [174] defendants to the United States Court of Appeals for the Ninth Circuit; and it is

Further Ordered, that this order shall be deemed and taken as a certificate of the undersigned Judge of this Court who presided at the hearing of said cause and before whom in said cause the testimony was given, motions made and the Court's rulings thereon, and that the said Bill of Exceptions contains a full statement of all the evidence in said cause and upon which judgment therein is based.

Dated this 15th day of March, 1949.

/s/ ANTHONY J. DIMOND,

District Judge.

Entered Court Journal No. G 18, Page No. 263,
Mar. 15, 1949.

[Endorsed]: Filed March 15, 1949. [175]

[Title of District Court and Cause.]

AMENDED PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the District Court, Third Division,
Territory of Alaska:

You are hereby requested to make a transcript of record to be filed in the United States Court of Appeals for the Ninth Circuit, pursuant to an Appeal taken in the above-entitled cause, and to include in said transcript of record, the following papers of record in said cause, to-wit:

1. Complaint.
2. Demurrer of Don Dorothy.
3. Demurrer of Pacific Northern Airlines, Inc.
4. Minute Order Overruling Demurrers of Defendants.
5. Answer of Don Dorothy.
6. Answer of Pacific Northern Airlines, Inc.
7. Reply to Answer of Don Dorothy.
8. Reply to Answer of Pacific Northern Airlines, Inc.
9. Minute Order Denying Motion for Nonsuit and Directed Verdict.
10. Minute Order Denying Motion for Judgment Notwithstanding Verdict.
11. Judgment.
12. Motion for New Trial. [176]
13. Minute Order Denying Motion for New Trial.
14. Petition for Appeal.

15. Order Allowing Appeal and for Supersedeas.
16. Citation on Appeal.
17. Assignments of Error.
18. Supersedeas and Cost Bond.
19. Acknowledgment of Service of Petition for Appeal, Order Allowing Appeal and Supersedeas, Citation on Appeal, Assignments of Error, Supersedeas and Supersedeas and Costs Bond.
20. Bill of Exceptions filed March 15, 1949.
21. Stipulation for Settlement of Bill of Exceptions.
22. Order Settling Bill of Exceptions.
23. This Amended Praecipe dated March 17, 1949.

Respectfully,

/s/ JOHN E. MANDERS,

Attorney for Defendant, Pacific Northern Airlines,
Inc.

EDWARD V. DAVIS,

Attorney for Defendant,
Don Dorothy.

Service admitted this 17th day of March, 1949.

/s/ W. N. CUDDY,

Attorney for Plaintiff.

[Endorsed]: Filed March 17, 1949. [177]

CERTIFICATE OF CLERK

United States of America,
Territory of Alaska, Third Division—ss.

I, M. E. S. Brunelle, Clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that the foregoing and hereto annexed 177 pages, numbered from 1 to 177, inclusive, are a full, true and correct transcript of the records and files of the proceedings in the above-entitled cause as the same appears on the records and files in my office; that this transcript is made in accordance with the stipulation for praecipe filed in my office on the 2nd day of August, 1944; that the foregoing transcript has been prepared, examined and certified to by me, and that the costs thereof, amounting to \$27.80, has been paid to me by John E. Manders, counsel for the appellant herein.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court this 20th day of April, 1949.

[Seal] /s/ M. E. S. BRUNELLE,
Clerk of the District Court, Territory of Alaska,
Third Division.

[Endorsed]: No. 12230. United States Court of Appeals for the Ninth Circuit. Don Dorothy and Pacific Northern Airlines, Inc., a Corporation, Appellant, vs. C. A. McCandless, Appellee. Transcript of Record. Appeal from the District Court for the Territory of Alaska, Third Division.

Filed April 23, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

